

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
MARCH TERM, 1871, AT ST. LOUIS.

THE STATE OF MISSOURI, Respondent, *v.* WILLIAM A. MARSHALL,
Appellant.

1. *Practice, criminal—Motion to quash must state what.*—A general statement, in a motion or demurrer to quash an indictment, that the same is defective and insufficient, does not comply with the statute (Wagn. Stat. 1090, § 24). The specific defect must be pointed out.
2. *Criminal law—False affidavit, information as to—Allegation.*—In an information under the statute (Wagn. Stat. 476, § 4) for making a false affidavit, if the authority of the magistrate to administer the oath is clearly asserted, that is sufficient, and the information need not set out the various facts which would authorize him to act as magistrate, such as his election, qualification, etc.
3. *Criminal law—Indictment—False oath, allegations as to.*—In indictments for making false affidavits it has always been held that if the materiality of the oath appear from the facts or documents set forth in the indictment, it is sufficient without any express allegation on the subject.
4. *Practice, criminal—Evidence in criminal cases examined in the Supreme Court.*—In criminal cases this court has always felt under obligation to examine the record and direct a new trial if conviction is not warranted by the evidence.

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The State of Missouri v. Marshall.

*Appeal from St. Louis Court of Criminal Correction.**A. J. Baker*, for respondent.*G. M. Smith*, for appellant.

BLISS, Judge, delivered the opinion of the court.

The defendant was prosecuted by information under section 4, chapter 203, General Statutes (Wagn. Stat. 476), which provides that "every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor," etc. This is a statutory offense less than perjury, and in St. Louis county to be prosecuted by information in the Court of Criminal Correction.

The information, after the introductory part, reads as follows: "That William A. Marshall, as this affiant believes, at present of St. Louis county aforesaid, in the county of St. Louis, on or about the — day of May, A. D. 1870, willfully, corruptly and falsely, before one William Keating, a justice of the peace within and for the county of St. Louis, duly authorized by law to administer oaths, did, for the purpose of obtaining possession of the premises of this affiant, under oath and affirmation, voluntarily make a certain false statement, to-wit: that he, the said William A. Marshall, being the complainant to said justice of the peace, who had full and complete jurisdiction of said cause against Louis Cafferata, this affiant, in an action of unlawful detainer, did swear that the said Louis Cafferata, on the day and year aforesaid (he then and there meaning the 2d day of May, 1870), wrongfully and without force and by disseizin obtained and continues in possession of the same premises (the premises mentioned in said complaint), after demand made in writing for the delivery of the possession thereof; and that the said William A. Marshall then and there well knew the said statement made under oath as aforesaid to be false and corrupt; and in truth and in fact that the said Louis Cafferata did not, on the 2d day of May, 1870, or on

any other day, wrongfully and without force, by disseizin, obtain and continue in possession of the said premises after demand made in writing for the delivery of the possession thereof, contrary to the form of the statutes," etc.

Upon the trial the defendant moved to dismiss the information, but failed to "distinctly specify the grounds of his objection," as required by section 24 of the act concerning indictments (Wagn. Stat. 1090), and the motion was properly disregarded. A general statement in a motion or demurrer that the indictment "is defective and insufficient," does not comply with the statute, but the specific defect must be pointed out. Hence we must treat the paper as though no objection were made, and can only inquire whether it will sustain the verdict of guilty.

Defendant's counsel raise a multitude of objections to the information, but they all may be resolved into two: first, that it does not appear that the affidavit was made before any one authorized to administer oaths; and second, that it does not appear to have been material to any legal proceedings, or that it was authorized by law. Both objections, if well taken, are substantial and go to the sufficiency of the pleading. An information should contain all the allegations in relation to the offense necessary in an indictment, and we are bound so far to treat it as an indictment. But this is not an indictment or information for perjury; the offense sought to be charged may amount to perjury, but defendant is not now on trial for that crime. The rules, then, applicable to indictments for perjury can apply to this information only so far as they legitimately pertain to this statutory offense.

First, it would be unreasonable to require any plainer or more specific allegation of the authority to administer the oath than is contained in the information. The authority is directly asserted, and to require the paper to set out the facts that would authorize the justice of the peace to act as such—as, for instance, his election, qualification, that his term had not yet expired, etc.—would encumber and disfigure it. The general allegation is sufficient to advise the defendant and enable him to contest the authority.

Upon the second point the information may be somewhat informal. It is unnecessary to inquire whether the statute, under

the term "for any purpose," will cover affidavits not provided for by law, inasmuch as the one set out purports to have been made to initiate a legal proceeding. But there is no difficulty, upon inspecting the paper, in seeing the purpose or object of the affidavit charged as false, etc. In indictments for perjury, the materiality of the oath must be made to appear either by direct averment as to what was necessary to be proved or sworn to, or by setting forth facts that shall show the materiality of the oath charged to be false; and in the present case most criminal pleaders would, before charging the offense, have stated as inducement that the legal proceeding (describing it, and in what court) was commenced by the accused against the defendant therein, state the necessity or materiality to the proceeding of the affidavit complained of, and then follow with the charge, and make the purpose of the affidavit to wrongfully obtain possession of the premises named in the proceeding. But though this mode of setting forth the materiality and purpose of the affidavit may be the better one, we can not for that reason hold the present information invalid; for it has always been held that if the materiality of its oath appear from the facts or documents set forth in an indictment, it is sufficient without any express allegation upon the subject. (Whart. Prec., 2d ed., p. 577, note c.) The substance of the affidavit and the proceedings showing its materiality are all set forth, and there is no possibility that the defendant could mistake the character of the charge.

But while I think the information sufficient, and in some respects excellent, I can not reconcile the conviction of defendant with the evidence. In criminal cases this court has always felt under obligation to examine the record and direct a new trial if the conviction is not warranted by the evidence. (State v. Bird, 1 Mo. 585; State v. Mansfield, 41 Mo. 470.) It does not affirmatively appear that the prosecution of the action of unlawful detainer was not made in good faith, and that defendant knew, when he made the necessary affidavit, that he had no right to the possession of the premises.

His counsel drew the paper and advised him that he had such right, and considering the nature of the oath—which is not so

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much to a specific fact as to a legal conclusion—I can not see, under the conflicting evidence as to its truth, how he could be found guilty of willfully and corruptly making the false statement, knowing it to be false.

The other judges concurring, the judgment will be reversed and the cause remanded for a new trial.

THE STATE OF MISSOURI, Appellant, v. ROYAL STEWART,
Respondent.

1. *Insurance, foreign—Agent—Proceedings against—Information—Court of Criminal Correction.*—One acting as agent and receiving premiums in St. Louis county, on behalf of a foreign insurance company which was not authorized by the superintendent of the insurance department to do business in this State, contrary to section 42 of the act concerning insurance other than life (Wagn. Stat. 777), may be proceeded against under section 30, p. 516, Wagner's Statutes. Notwithstanding that the statute which creates the offense provides for a different remedy (Wagn. Stat. 777, § 43), there is no inconsistency between the two statutes. But the proceeding in such case must be by information in the Court of Criminal Correction, and not by indictment.

As to all the rest of the State besides St. Louis county, the misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), repealed by implication section 30, *supra*, and was not restored by the repealing act of February 24, 1869 (Sess. Acts 1869, p. 69). (See *State v. Huffs Schmidt, ante*, p. 73.)

Appeal from St. Louis Court of Criminal Correction.

G. M. Smith and C. H. Chapin, for respondent.

I. The court below properly dismissed the case, because: 1. It was not brought in conformity with the statute, which requires that the proceeding shall be in the name of the State, by the attorney-general or the circuit attorney of the proper circuit. (1 Wagn. Stat. 777, § 43.) 2. Because the court had no jurisdiction over the subject-matter of the proceeding. The only remedy given for the acts which the information undertakes to charge is specified in the forty-third section of the act of 1869 for the regulation of insurance companies, etc., and on this section the prosecution relies and bases this proceeding. (1 Wagn. Stat. 777,

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§ 43.) The statute expressly requires that the penalty shall be "sued for in the name of the State by the attorney-general or the circuit attorney" of the proper county. (1 Wagn. Stat. 777, § 43.) This is not an offense at common law; it is not made a misdemeanor by the statute; and being a penal statute, the remedy must be strictly pursued. (Journey v. State, 1 Mo. 304; Commonwealth v. Howe, 15 Pick. 231; 1 Whart. Crim. Law, 371, § 373; 1 Russell on Crimes, 50-1; 1 Com. Dig. 444; Dane's Abr., ch. 148, pp. 244, 246; Commonwealth v. Evans, 13 Serg. & R. 496.)

II. The remedy provided by the act is a *qui tam* action, which is a civil action. (State v. Mathews, 44 Mo. 523; Dane's Abr., ch. 148, 243; Acheson v. Everitt, Cowper, 382; Wilson v. Bastall, 4 Tenn. 756; Rex v. Robinson, 2 Burr. 805; Rex v. Wright, 1 Burr. 545; 3 Blackst. Com. 159.) The remedy being a civil action, the Court of Criminal Correction had no jurisdiction over the subject-matter of this proceeding.

BLISS, Judge, delivered the opinion of the court.

The defendant was prosecuted by information in the St. Louis Court of Criminal Correction, for acting as an insurance agent and receiving a premium for insurance from fire on behalf of a foreign insurance company, the said company not having been authorized by the superintendent of the insurance department to do business within the State. The defendant moved to dismiss the proceedings, upon the ground that he could only be proceeded against according to the provisions of section 43 of the act concerning insurance other than life (Wagn. Stat. 777), which subjects those who violate the act to a penalty of \$500 (or to imprisonment if it is not paid), to be sued for and recovered in the name of the State by the attorney-general or circuit attorney, one-half of the penalty to go to the informer. The proceedings were dismissed, and the State appeals.

It is not pretended that this proceeding conforms to the section referred to, but the attorney for the State relies upon section 30, chapter 207, Gen. Stat. 1865 (Wagn. Stat. 516), which provides that "wherever a fine, penalty or forfeiture is or may be

inflicted by any statute of this State for any offense, the same may be recovered by indictment," etc., "notwithstanding another or different remedy for the recovery of same may be specified in the law imposing the fine, penalty, or forfeiture." This section, with the act authorizing informations for misdemeanors in St. Louis county, fully justifies, as he claims, the proceeding which he instituted.

The remedy provided by said section 43 of the insurance act is a civil action in the nature of the old action of debt *qui tam* upon a penal statute. A prosecution is expressly authorized to recover a specific penalty, and there can be no doubt that in a proceeding under this section its provisions must be followed. The officer is named who should conduct it, and the present information does not even purport to comply with its directions.

But the law may authorize a double remedy, and the statute (§ 30 above quoted) is clear and unambiguous. If the insurance act provides for a "penalty," and the violation of its provisions be an "offense," there can be no doubt whatever that this double remedy is provided. Defendant's counsel urge that where the statute creating the offense provides a remedy, there no indictment will lie. However correct may be the position in general, it must yield to the statute, which expressly provides for a remedy by indictment as well. Nor is there any inconsistency, as claimed, in the two provisions. The insurance act gives half to the informer, and the last clause of the section authorizing an indictment provides "that in all cases the fine, penalty or forfeiture shall go to the State, county, corporation, person or persons, to whom the law imposing the same declares it shall accrue." So it does not matter how the penalty is recovered, it goes half to the State and half to the informer. Under the local laws applicable to St. Louis county, instead of an indictment, the prosecution of offenses of this kind must be by information; hence the present proceeding is regular. It should, however, be noted that as to all the rest of the State, the misdemeanor act of March 27, 1868, repealed by implication said section 30, chapter 207, Gen. Stat. 1865, and it was not restored by the repealing act of February 24, 1869. (See *State v. Huffschtmidt*, ante, p. 73.)

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If an indictment were presented, it should be in the name of the attorney-general or proper circuit attorney; for the words authorizing an indictment do nothing more; so that the legal effect and purport of the two provisions is to authorize the penalty to be recovered in the name of the State by the attorney-general or circuit attorney, either by civil action or by indictment. Section 19, however, of the act of March 5, 1869, concerning the Court of Criminal Correction (Sess. Acts 1869, p. 197), provides that "no indictment shall hereafter be found for any misdemeanor under the laws of this State, committed in the county of St. Louis, the punishment whereof is by fine or imprisonment in the county jail, or both, or by any forfeiture; but the same shall be presented to the Court of Criminal Correction by information. An information in any such case may be lodged by the prosecuting attorney for said court, or by said assistant prosecuting attorney, or by any other person." Thus we see that in that court indictments are forbidden and informations are required, which may be lodged by persons other than the attorney-general or circuit attorney.

The order dismissing the information is reversed and the cause remanded. The other judges concur.

MORRIS W. LEMCKE, Respondent, v. EDWARD B. BOOTH,
Appellant.

Bankrupt act of 1867—Agent—Commission merchant acts in a fiduciary capacity, within meaning of section 33.—Under section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 533), an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in such capacity are not discharged under that act.

Appeal from St. Louis Circuit Court.

This is a suit to recover from defendant an indebtedness which arose by a sale of liquorice of the plaintiff, consigned to defendant as a factor or commission merchant. Before all the proceeds

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of sale had been paid over, the defendant failed, and now pleads his discharge in bankruptcy as a bar to the suit. The court, on demurrer, decided for plaintiff, and final judgment was entered.

Lackland, Martin & Lackland, for appellant.

If no conversion takes place before a sale in market, but he sells in the ordinary course of his business, there can be no conversion afterward. The identity is gone, and a common commingled fund substituted in the place thereof. Hence the fiduciary relation to the subject-matter is gone after sale. A factor, by virtue of his calling, has the right to sell his customers' goods in a common sale. He has the right to receive the proceeds after the nature of the sale, in one common fund. He has the right to deposit them in one common fund. These three rights are conferred upon him, and result from the necessity and convenience of his calling. No factor could do business in this city, or does do business, in any other way.

This commingling of the proceeds of the sales—rightfully commingling—results logically in the destruction of the property of his customers and the substitution of his own indebtedness in its place, just like the case of a banker. The right to commingle is the right to destroy the identity of the original property, by converting it into a fund in which one customer has no individual property more than another. Nothing can be left but the indebtedness of the factor. The right and property of the customer is lost, and he has nothing left but the indebtedness of his factor; he holds only a claim for a certain amount. Whenever the claim of the customer culminates in a simple indebtedness, the factor is a debtor like any other debtor—the fiduciary element is gone.

Henderschott & Chandler, for respondent.

Appellant contends that *eo instanti* with the happening of a sale the whole *status* of the parties is changed, and that not only does the principal part with his title to the property sold, but he acquires instead thereof no interest or title to the proceeds of the same, but merely a claim against his agent by way of debt for so much money as equals the net proceeds of sale, less commissions,

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etc. The naked statement of the proposition carries with it its own refutation. This argument would destroy a trust as soon as a trustee had acquired possession of the trust fund, and before the trust had been executed, and turn the trustee into the beneficiary. Against such a doctrine authority and reason alike revolt. (See Hill on Trust. 41; 2 Kent's Com. 623; Merrill v. Bank of Norfolk, 19 Pick. 32; Walsh's Assignees v. Plumer, 3 M. & S. 562; Sto. Agency, 229-31; Thompson v. Perkins *et al.*, 3 Mason's C. C. 232; Samuel v. Judin, 6 East, 333; Dugans v. Edwards, 50 Barb. 296.) If the agent make use of the proceeds of the property in his own business, he can only do so by subjecting himself to the legal liabilities arising out of the misappropriation of another's property. (Shudder v. Shiells, 17 How. Pr. 420; Ostell v. Brugh, 24 How. Pr. 174; Frost v. McCarger, 14 How. Pr. 131; Holbrook v. Homer, 6 How. Pr. 86.) The case of Chapman v. Forsyth, 2 How., S. C., does not apply to the act of 1867. The present question, under the act of 1867, is not altogether new. It has been presented for adjudication to courts of the United States in the State of New York, and the decisions have been uniform that the factor was not discharged under the act. (*Ex parte* Seymour, 6 Int. Rev. Rec. 80, S. C.; 1 Binn. 348; *Ex parte* Kimball, 2 Bank Reg. 74; *id.* 114; 6 Blatchf. 292.)

CURRIER, Judge, delivered the opinion of the court.

The question is here presented whether a factor or commission merchant stands in a fiduciary relation to his principals in respect of the proceeds of sales of commission goods, within the meaning of section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 533). The section provides that "no debt created by the fraud or embezzlement of the bankrupt, or his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under the act." The corresponding provision in the bankrupt act of 1841 excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." The

"fiduciary capacity" here mentioned was held by the Supreme Court of the United States to refer to technical trusts of the character of those previously mentioned, and not to trusts raised by implication of law. It was therefore held that an indebted factor or commission merchant was not a fiduciary debtor within the meaning of the act of 1841. (*Chapman v. Forsyth*, 2 How. 202.)

But the above-recited provisions of the two acts (of 1841 and 1867) are quite dissimilar. Blatchford, J., in the matter of Seymour on *habeas corpus*, 6 Int. Rev. Rec. 60, distinguishes the two provisions, and comments upon *Chapman v. Forsyth* as follows: "The Supreme Court held that a discharge under the act of 1841 did not release the bankrupt from any such debts (as were mentioned in the clause of the act of 1841, above quoted), and that no debt fell within the description of a debt created by a defalcation while acting in any *other* fiduciary capacity, unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held that the language of the act of 1841 was not broad enough to include *every* fiduciary capacity, but was limited to fiduciary capacities of a specified standard and character. That was clearly so under that act. But in the act of 1867 the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in *any* fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore, under the act of 1867," says the judge, "no debt created by the defalcation of a bankrupt while acting in any fiduciary capacity will be discharged." These views are approved by Nelson, J., in his decision *In re Kimball*, 6 Blatchf. 292.

A commission merchant acts in a fiduciary character, and the trust attaches to the goods consigned to him for sale on commission and to their proceeds when the goods are sold. (*Chapman v. Forsyth*, *supra*; *Duguid v. Edwards*, 50 Barb. 288.)

Concurring in the views of Judge Blatchford as above quoted, the judgment will be affirmed. The other judges concur.

MATILDA KUHN, Appellant, v. JOHN MCNEIL *et al.*, Respondents.

1. *Injunction — Execution sales — Cloud on title.*— Injunction will not lie to stay execution sales simply on the ground that they will pass no title and may cast a cloud on the title of the true owner.

Appeal from St. Louis Circuit Court.

Hill & Jewett, for appellant.

What is a cloud must generally be determined from an examination of the cases where that matter has been decided. In *Morris v. Hogle*, 37 Ill. 150, it was decided that a sale under a void decree was a cloud, and the sale was set aside. In *England v. Lewis*, 25 Cal. 357, it is decided that a sale under a judgment claimed as a lien, where in law there was no lien, would be a cloud, and such sale was enjoined. In *Pettit v. Shepherd*, 5 Paige's Ch. 501, an attempted sale under a judgment claiming a lien where none existed in law, was restrained. In *Lyon v. Hunt*, 11 Ala. 295, an irregular tax deed, casting a cloud, is set aside; In *Burt v. Cassity*, 12 Ala. 734, a sale on execution claiming a lien, not valid in law, is restrained. See also *Oakley v. Trustees of Williamsburg*, 6 Paige's Ch. 264-5, where invalid assessments for street improvements were declared to be a cloud. But the case in which this question is most clearly discussed, and a practical and sensible rule laid down, is *Pixley v. Huggins*, 15 Cal. 127, where the court gives this rule: "The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed." Now, where tested by this rule, a sale under the execution asked to be enjoined in this case would be a very dark cloud. That the court will restrain an act which, if committed,

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would cast a cloud upon plaintiff's title, is well settled by the cases above quoted and many others.

Mauro & Laughlin, for respondents.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff claims to be the owner in fee of the premises described in the petition. He avers that the defendant McNeil, as sheriff, has levied upon the premises, and that he is about to sell them upon an execution against a third party who has no title or interest in the property. An injunction is asked upon the ground that the threatened sale, if proceeded with to its consummation, will cloud the plaintiff's title.

I see nothing in the case to distinguish it in principle from *Drake v. Jones*, 27 Mo. 428. The opinion in the case referred to concludes as follows: "Our first impressions of this question were the same that they now are, but the learned argument of the plaintiff's counsel created doubts that led us to a careful examination of the subject in all its bearings, which has resulted in the conviction that, under our system of laws and practice in reference to execution sales, it would be unwise and create great confusion in the administration of justice to permit sales under execution to be enjoined on the ground that they will pass no title and might cast a cloud on the title of the true owner."

Judgment affirmed. The other judges concur.

LOUIS G. PICOT, ADMINISTRATOR OF ANN DILLON, Respondent,
v. BARTON BATES *et al.*, Appellants.

Administration — Final settlement has the force of a judgment.—An administrator's final settlement must bind the estate with the force of a judgment unless it can be impeached for fraud.

Appeal from St. Louis Circuit Court.

C. C. Whittelsey, for respondent.

A. W. Alexander, for appellants.

BLISS, Judge, delivered the opinion of the court.

This case has heretofore been before this court, and is reported in 39 Mo. 292. All the preliminary questions raised by defendants were there decided, and we have only now to consider the question of fraud as charged in the petition.

P. M. Dillon, deceased, was administrator of the estate of his deceased wife, and, as such, in 1845 made his final settlement, in which he charged himself with \$2,768.49, as received from the estate of John T. Nash, upon a claim in favor of his said wife. The account shows sundry credits, the first of which are \$2,301.20 debt and \$1,116.09 interest, entered as follows: "By amount of my demand allowed by the court against the estate of John Nash, deceased, on the 16th of November, 1837." This amount and interest contained no reference to a voucher, but the subsequent items all referred to vouchers in regular order. The record entry shows that the account came under the special cognizance of the court, that the debits amounted to \$2,768.49 and the credits to \$3,650.22. Ann E. Dillon, deceased, was one of the daughters of Ann T. Dillon, and entitled to one-third of her estate, which her administrator now seeks to recover from the heirs of P. M. Dillon, charging fraud in the settlement.

This settlement, so far as the orders of the court are concerned, appears to have been regular, and it must bind the estate with the force of a judgment unless it can be impeached by fraud. (*Jones v. Brinker*, 20 Mo. 87; *State v. Rowland*, 23 Mo. 98.) The plaintiff claims that he has established his charge from the face of the account in connection with evidence; that the record fails to show any such allowance of a demand of \$2,301.20 against the estate of John T. Nash.

Judging merely from the evidence now before us, and assuming that there was no more at the time of the approval of the account, it is clear that the credit should not have been allowed. The record shows no allowance of any claim against the Nash estate except the one with which the administrator is charged, and if it were allowed it does not appear how he could be credited with it. The account looks very much as though the administra-

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tor had charged himself with a matter and then credited himself with the same thing as a set-off; and if it had not been once judicially passed upon and approved, we might so find. Or, if all the evidence submitted to the Probate Court were now before us, and the matter was not explained, we might say that the court was imposed upon by a fictitious credit. We are wholly in the dark as to how this credit came to be allowed by the court, and yet it is impossible to say that evidence could not have been submitted that would authorize its allowance. The fact that it can not now be explained does not necessarily show that it was not then. The receipts and accounts submitted give us hints as to possibilities.

The claim of P. M. Dillon, as administrator against the estate of Nash, was for the purchase money of land sold by Nash to Mrs. Dillon, and due her in consequence of a failure of title. The deed to her was dated November 15, 1837, one day before the date of the demand credited to Dillon. We may conjecture that the two things had some legitimate connection, which was known at the time but can not be now. Also, we find that the account of Nash's administrator contains a charge to him of \$2,759.50 for cash received of Dillon upon purchase of real estate, and a credit of the same amount paid him upon said claim of Mrs. Dillon. This account does not of itself explain the difficulty, but if we had the explanations of the men then living, which were doubtless submitted to the Probate Court, it might make the matter very plain. The credit has a bad appearance, and looks as though it were wholly fictitious; yet it is evident that it was specifically considered by the court, and for some reason was allowed. More than ten years elapsed before the matter was first looked up by those interested, and it was their fault if, by lapse of time, it had become impossible to explain the transaction; and courts will never assume fraud from mere obscurity or apparent error.

The plaintiff has failed to establish affirmatively any fraudulent act or contrivances of Dillon, and has failed to exhibit all the evidence submitted to the Probate Court, so that we might be advised as to the ground of its action in allowing the suspicious-

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looking claim; whether the allowance was rightful or erroneous merely, or whether the court was imposed upon by the fraudulent acts of Dillon. The judgment must therefore be reversed and the cause remanded, that the petition, if the plaintiff has no more evidence, may be dismissed. The other judges concur.

On motion for rehearing, the court delivered the following opinion:

The plaintiff asks for a rehearing upon the ground of a mistake in the opinion in the date of the deed from Nash to Mrs. Dillon, caused by an incorrect minute in the record. The correct date does not affect the case, the conclusion of law not being drawn from it. It is difficult to resist the conviction that there was fraud or mistake in the settlement complained of. Without extrinsic explanation, the error is so very obvious as to lose one of the badges of fraud. At this day the matter can not be explained. But more than twenty years have elapsed, and we are called on to say that a judgment regularly entered and long acquiesced in shall be impeached for fraud because merely the consistency of the account adjudged can not now be shown. It would never do to adopt such a practice.

The motion is overruled. The other judges concur.

ST. LOUIS BUILDING AND SAVINGS ASSOCIATION, Appellant, v.
JOHN H. LIGHTNER, Respondent.

1. *Revenue—County collector, errors of, in listing property, will not avoid assessment.*—The county collector is an executive officer, and has always been protected by his precept, unless it appears on its face to have been issued against property wholly exempt from taxation. Mere errors or irregularities in the manner of listing property, in the name of the supposed owner, or in any other respect not to render the paper void, will not excuse the collector from the performance of his duty.
2. *Revenue—Taxation—U. S. bonds, shares of stock invested in, may be taxed.*—Although United States bonds as such can not be taxed, the shares of the capital stock of a corporation can be taxed at their true value, although a part or the whole of it may be invested in such bonds. Thus the bonds are in effect taxed as affecting the value of the shares of stock; and where the officers

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of the bank furnish the assessor with the names of the shareholders, together with the amount of stock held by each, their shares should be so assessed as to cover the value of their bonds, and it will be the duty of their officers to pay this tax on behalf of the shareholders.

And where the officers make no objection on the ground of the irregularity of the assessment, and are themselves a party to it, and the claims of the assessor are substantially correct, upon no principle should they be permitted to say that his error in assessing the shares to the bank instead of its stockholders rendered the assessment void and the collector a trespasser.

Appeal from St. Louis Circuit Court.

Glover & Shepley, and Gardner, for appellant.

I. The assessment and tax bill upon which this levy was made are utterly void upon their face, because: (a) All the assessment, including the \$70,500 of United States bonds, was upon capital stock of the corporation, and the whole of it was void as unauthorized by law. If there could be any assessment against said corporation whatever, under the law as it then existed, it could only be for so much property specifically stated in the assessment as so much property "in excess of capital stock" distinctly stated to be assessed as such. (b) That portion of the payment of which the levy was made was void for the additional reason that it was part of the capital stock invested in United States bonds, and was so stated on the face of the tax bill. (c) There was then nothing upon the face of the assessment or tax bill authorizing the collection of any tax against this company—certainly nothing authorizing this. (42 Mo. 426.)

II. It being altogether illegal, the officer can not justify under the warrant. (State, etc., v. Shacklett, 37 Mo. 280, and cases cited; Hann. & St. Jo. R.R. v. Shacklett, 30 Mo. 550.)

III. The case of Glasgow v. Rowse, 43 Mo. 479, holds no doctrine antagonistic to this.

IV. The assessment and tax was illegal and unconstitutional, if held to be a taxation upon shares, in requiring it to be paid by the corporation.

V. If the instruction given by the court be correct, then so long as the officer can find personal property to levy upon, no person can resist the payment of an illegal tax. Nor is it any

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answer to say that the corporation can be made to pay the same tax by re-assessing the shares of stock in the rightful owner. It is of the greatest importance that the officers should comply with the law and make their assessments legally. If they do, and the bank pays, the law provides the way in which it may get back the amount paid by it for the individual stockholder.

H. A. Clover and *L. Gottschalk*, for respondent.

I. Although the capital stock of the corporation invested in the bonds of the United States is not subject to taxation by the State, the shares of stock of a corporation, although every dollar of the capital is invested in United States bonds, are subject to taxation by the State.

II. Whether the assessment was in proper form or not, the defendant can not be held liable as a trespasser. He is protected and justified by the tax bill, and is perfectly defended as a ministerial officer charged by law with the execution of process. (*Glasgow v. Rowse*, 43 Mo. 480; *Turner v. Franklin*, 29 Mo. 285; *Milburn v. Gilman*, 11 Mo. 64; *Davis v. Packard*, 10 Wend. 71; *Coleman v. McAnulty*, 16 Mo. 176.)

BLISS, Judge, delivered the opinion of the court.

This case has been once before us, and is reported in 42 Mo. 421; it has been again tried, and under the following instruction a verdict was given and judgment was rendered for defendant:

"The court declares the law in the above-named case to be that even though the assessment of the capital stock of the plaintiff was not in accordance with the mode prescribed for assessing a tax against corporations, yet if the proper officers did assess the tax and place the tax bills in the hands of defendant for collection, and he was the proper person to collect taxes and was authorized by law to make seizures in case of non-payment of taxes, then plaintiff can not recover in this action."

This instruction in reference to the undisputed facts of the case is strictly correct. If the capital stock of plaintiff, either as shares of stock or as property of the corporation, was entirely exempt from taxation, so that the assessor had no right to med-

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dle with it or to list it in any form, then his proceeding would have been void, and would have been no protection to the collector acting under the assessment furnished him. But the collector is an executive officer, and has always been protected by his precept, unless it appears upon its face to have been issued against property wholly exempt from taxation. Mere errors and irregularities in the manner of listing, in the name of the supposed owner, or in any other respect not to render the paper void, will not excuse the collector from the performance of his duty. There may be irregularities that would make the action of the assessor a nullity, but the ordinary mistakes into which he falls can have no such effect. The law makes ample provision for correcting all such mistakes before the assessment goes into the collector's hands, and if the property-holder fails to avail himself of his opportunity, it would be a great hardship to subject the collector to the penalties of a wrong-doer, for errors not his own.

In the case at bar, the assessor furnished the plaintiff's officers with the usual blank for returning their property for assessment. Instead of delivering "to the assessor a list of all shares of stock held therein and the names of the persons who held the same," as required by law, they made return as follows:

The capital stock of this association on the 5th day of September, 1864.....	\$292,600
Of which capital stock the association had invested on that day in United States bonds, which are exempt from taxation by law.....	70,500
Amount subject to taxation, less the return of real estate.....	\$222,100

The assessor assessed the real estate, describing it, at \$30,120, and the capital stock returned as above as "shares of stock in incorporated companies, \$292,600."

The plaintiff's officers appealed to the County Court, who very properly struck off the valuation of the real estate as being included in the "shares of stock," etc. The tax was cheerfully paid upon the whole amount except the \$70,500 claimed to be invested in United States bonds, which was only paid upon compulsion, and this suit is to recover the assessment upon that amount.

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It should be noticed as affecting the question of personal liability of the collector that the plaintiff's officers made no objection to the mode of assessing the capital stock, including the bonds. The president, Mr. Coste, testifies: "The bank never protested against paying taxes in the way we were assessed. We objected to pay this tax (on the United States bonds) because we did not think it was taxable in any shape. If the tax bill had been made against the shareholders instead of against capital stock, I can't say what I should have done. I was making objection to the taxing of the \$70,500 bonds, not to the manner of assessing." Now, while it is true that the United States bonds, as such, can not be taxed, it is also true that the shares of the capital stock of a corporation can be taxed at their true value, although part or the whole of it may be invested in such bonds. (National Bank v. Commonwealth, 9 Wall. 353.) Thus they are in effect taxed as affecting the value of the shares of the stock; and had the plaintiff's officers furnished the assessor the names of the shareholders, with the amount of stock held by each, their shares would have been so assessed as to cover the value of their bonds, and it would have been the duty of their officers to pay this tax on behalf of the shareholders. The president says that he returned to the assessor the amount of the capital actually paid in, and no losses being shown, the aggregate value of the shares would not be less; hence, if the assessment had been altogether regular, the plaintiff would have paid precisely what was collected by defendant. Making no objection upon the ground of the irregularity, and being themselves a party to it, and it appearing that the claims of the assessor were substantially correct, upon no principle should the plaintiff's officers be permitted to say that his error in assessing the shares to the bank instead of its stockholders rendered the assessment void and the collector a trespasser. The amount was paid under protest, not because the value of the bonds was not assessed to the shareholders, but because it was included in any assessment.

When the case was here before, no question had been raised in the Circuit Court in regard to the personal liability of the defendant, and the only point determined was that the bonds were not

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subject to taxation. The case of *The St. Louis Mutual Life Ins. Co. v. Charles*, in many respects similar to the present, has been before us at this term, in which we held that the collector was not liable as a trespasser, notwithstanding the property of the company had been assessed instead of the shares of stock. Conforming to the doctrine of that opinion, the judgment will be affirmed. The other judges concur.

PETER A. O'NEIL, Appellant, v. ELLEN DOYLE *et al.*,
Respondents.

Practice, civil — Appeal — Judgment — Failure to file statement and brief.—
When defendant fails to file a statement and brief, as required by statute, the judgment will be affirmed.

Appeal from St. Louis Circuit Court.

H. A. Clover, for appellant.

Thos. T. Gantt, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The appellant in this case having failed to file any statement and brief, as required by statute, the judgment will be affirmed. The other judges concur.

BENJAMIN KIMBALL, Appellant, v. WILLIAM A. BRAWNER,
Respondent.

1. *Contract — Ambiguity — Usage not proper evidence to explain written contract, when.*—No usage, however general and well understood, can be permitted to control the terms of a special contract, where its subject-matter and terms are clear of doubt and obscurity.

Evidence of usage comes in to show the intention of the parties in all those particulars which are not expressed in the contract, or which are expressed in unusual or technical terms.

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*Appeal from St. Louis Circuit Court.**Garesche & Mead*, for appellant.*O'Neil & Quigley*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The defendant contracted in writing to pay the plaintiff "twenty per cent. upon all original or first years' premiums * * collected and paid in by him (the plaintiff) upon policies issued upon applications taken" by the plaintiff. This suit is brought upon the contract to recover a balance claimed to be due under the above-recited stipulation.

According to the obvious reading of this stipulation it is clear that it secured commissions to the plaintiff alone upon moneys actually collected and paid in by him. His right to the commission is made dependent upon an actual collection and payment. That this is the true construction of the contract upon its face is not disputed. The plaintiff, however, at the trial sought to explain the stipulation, and to enlarge its scope by the introduction of evidence *aliunde*. He offered to show by parol that it was the established "usage, custom, and method of doing business by the insurance company in regard to policies (in respect) of which the plaintiff and defendant had stipulated, to treat all premiums as 'collected,' though, for the convenience of assured, payable by installments." In other words, it was offered to be shown, in the way of explaining the contract, that the insurance company concerned in these policies and premiums, upon the acceptance of an application and the issue thereon of a policy, was accustomed to credit the soliciting agents' commissions at once, although the premium for the first year, upon which the commission was allowed, was not then paid, and was payable by installments at future dates. The court excluded the evidence, and the plaintiff complains of its action in that respect as erroneous, and brings the case here by appeal.

No usage, however general and well understood, can be permitted to control the terms of a special contract, where the

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subject-matter of the contract and its terms are, as in this case, clear of all doubt or obscurity. There is no question in regard to the subject-matter of the stipulation; nor is there any question in regard to the terms employed in expressing the agreement of the parties respecting that subject-matter.

The defendant agreed to pay the plaintiff a commission on all moneys which the plaintiff should collect and pay over. There is nothing here for a construction. The plaintiff is simply suing to recover commissions on moneys which he did not collect and pay over, and seeks, by the aid of a construction founded on usage, to so enlarge the scope of the stipulation as to include commissions on all original premiums, whether collected and paid over or not. The parties might have so contracted, but did not. The usage must yield to the express stipulations contained in the written agreement.

Where the subject-matter of a contract is in doubt, extrinsic evidence may doubtless be employed to establish facts and circumstances showing the true subject of the contract. So, when a new and unusual word is used, or when a word is used in a technical or peculiar sense as applicable to any trade or calling, or to any particular class of people, evidence of usage may be employed to explain and illustrate the unusual word or technical term. But where the subject-matter is certain, and there is no doubt as to the import of the terms employed, evidence of usage is not admissible in respect to what the contract expressly declares. Evidence of usage comes in to "show the intention of the parties in all those particulars which are not expressed in the contract," or which are expressed in unusual or technical terms. (*Cotton Press Company v. Stanard*, 44 Mo. 71; *Souther v. Kellerman*, 18 Mo. 511; *Eaton v. Smith*, 20 Pick. 156; 1 Greenl. Ev., §§ 287, 289.)

I am of the opinion that the plaintiff's evidence of usage was properly excluded, and that the judgment ought to be affirmed. The other judges concur.

McCullough v. Baker et al.

PATRICK McCULLOUGH, Respondent, v. L. D. BAKER *et al.*,
Appellants.

1. *Damages, measure of*—*Contracts not completed by reason of the default or unwarranted acts of the other party—Quantum meruit, etc.*—Where the contractor is prevented from completing his job by the unwarranted acts and defaults of the other party, he may either sue upon the contract and claim damages for a breach of it, or he may waive the contract and sue for the reasonable value of his work. He is not restricted to a *pro rata* share of the contract price.

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, and Lackland, Martin & Lackland, for appellants, cited in argument *Shannon v. Comstock*, 21 Wend. 457; *Heckscher v. McCrea*, 24 Wend. 304-9; *Clark v. Marsiglia*, 1 Denio, 317; *Wilson v. Martin*, *id.* 602; *Spencer v. Halstead*, *id.* 606; *Boardman, Adm'r, v. Keeler*, 21 Verm. 78, 84.

Bakewell & Farish, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff contracted with the defendant to do the masonry work of a church edifice for the sum of \$6,000. He entered upon the execution of the contract, but never completed it. He avers that he was prevented from doing so by the unwarranted acts and defaults of the defendants. This averment is traversed by the answer, and the issue thus raised has been investigated by three different juries, the trial in each instance resulting in a verdict for the plaintiff. At the last trial, the court, at the instance of the plaintiff, gave the following instruction: "If the jury believe from the evidence that the plaintiff performed extra work on the church in question for the defendants, and at their instance and request; and that on the 8th of December, 1866, over and above the amount then paid the plaintiff and the amount then due mechanics for work on said church, there was anything yet due and unpaid the plaintiff, and yet, nevertheless, the defendants required a bond of plaintiff to go on and complete the work at the contract price, without any allowance for such extra work,

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and refused to pay him money, they will find that the defendants broke their contract with the plaintiff."

This instruction is objected to as misdirecting the jury as to the sums to be credited to the defendants, and as assuming an erroneous construction of the contract. The evidence shows that the defendants were entitled to \$977.82 credit for money paid in discharge of mechanics' liens. A small portion of the sum thus paid was on account of liens to parties other than mechanics. The instruction was carelessly drawn, and refers to sums due mechanics, instead of the sums due on mechanics' liens. What was meant was sufficiently apparent, and there is no pretense that the jury excluded any part of the \$977.82. The whole amount of credits claimed by the defendants, on account of these liens and for payments directly to the plaintiff, was \$5,191.82. There was no controversy about the aggregate amount of payments, and the jury, by a subsequent instruction, were directed, in effect, to allow the whole amount claimed. They were told that, unless the plaintiff's claim exceeded the sum of \$5,191.82, they should find for the defendants.

As for the construction placed upon the contract, it provided that the work should be paid for as it progressed, and the provision must have a fair and reasonable construction. Of course the parties did not mean by it that payments should be made as the work progressed from day to day. Nor does the instruction convey that idea. The jury found, as the verdict shows, that there was due and in arrears to the plaintiff, at the time mentioned in the instruction, about \$1200. That fact should end all cavil on this point. In the light of the undoubted facts of the case, as affirmed by the verdict, the objections urged against this instruction are without any substantial force or merit. Nor is there any force in the objection taken to the instruction given by the court upon its own motion; as, applied to the facts of the case, the instruction undoubtedly laid down an incorrect rule of damages. The error was all in favor of the defendants. They have no ground of complaint. The suit is not founded upon the contract. The plaintiff waives that and sues upon the *quantum meruit*. If he is entitled to recover at all

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he is entitled to recover a reasonable compensation for the work actually done. That is the rule where the contractor is prevented from completing his job by the unwarranted acts and defaults of the other party. In such a case he is not restricted to a *pro rata* share of the contract price. He may either sue upon the contract and claim damages for a breach of it, or he may, as in this case, waive the contract and sue for the reasonable value of his work. (Sedgw. Dam., 4th ed., pp. 251-2, notes; Morrill v. Ithaca & Oswego R.R., 16 Wend. 586; Clark v. Mayor of New York, 4 Comst. 338; Chamberlin v. Scott, 33 Verm. 80.) The instruction under review confines the jury in assessing damages as closely as possible to the contract price, and that, as the whole case shows, was below the reasonable value of the work. It was therefore more favorable to the defendants than was warranted under the pleadings and evidence.

There is no meritorious ground for reversing the judgment of the court below, and it will therefore be affirmed. The other judges concur.

MICHAEL DULLARD*, ADMINISTRATOR *de bonis non* OF PHILIP DULLARD, Appellant, v. JAMES A. HARDY, FORMER ADMINISTRATOR OF PHILIP DULLARD, Respondent.

1. *Courts, probate — Claims, allowance of — Judgment, impeachment of.*— Where a Probate Court disallowed a credit claimed by an administrator in his final settlement against an estate, for a payment which had been made by him in advance of any order of that court, and within a year from the grant of his letters, the order of disallowance will, on appeal to the Supreme Court, be sustained, notwithstanding that the Probate Court had allowed and classified the claim paid by him. It is true that an allowance and classification by the Probate Court is in effect a valid judgment, which can not be impeached collaterally. But the disallowance of the credit does not rest upon the theory of any error or wrong in the judgment of the Probate Court.

Appeal from St. Louis Circuit Court.

F. & L. Gottschalk, for appellant

An allowance made to an administrator in his settlement has the effect of a judgment, but it may be set aside in equity on

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cause being shown. (Jones v. Brinker, 20 Mo. 87; Whittelsey v. Dorsett, 23 Mo. 236; Oldham v. Trimble, 15 Mo. 225.)

Garesche & Mead, for respondent.

No principle of law is more clearly established than that a judgment can not be impeached collaterally.

CURRIER, Judge, delivered the opinion of the court.

The respondent, Hardy, was the original administrator upon the estate of Phillip Dullard, deceased. Upon being removed he presented his administration account for settlement, which was passed upon and approved, except a credit to himself of \$250. This credit was for paying a claim of that amount which had been allowed against the estate and placed in the fifth class, being a claim exhibited within one year after the grant of letters. The credit was disallowed and ordered to be stricken from the account, on the ground that the payment was made in advance of any order of court, and prior to the expiration of one year from the grant of letters and before the court was informed as to whether there would be any assets applicable to debts falling within the fifth class. Hardy appealed, and the Circuit Court, upon a trial anew, reversed the judgment of the court below and directed an allowance of the \$250 credit. Whereupon the administrator *de bonis non* appeals and brings the case to this court.

The respondent's counsel correctly assume that the allowance and classification of the \$250 claim was a judgment which was not open to a collateral attack. Upon that proposition the action of the Circuit Court is sought to be defended. It seems to be the view of counsel that the payment by Hardy was necessarily proper and warrantable because the payment was of a legal and valid judgment in full force and not set aside.

The conclusion does not follow from the assumed premises. The judgment of allowance and classification is not assailed, although the evidence shows that it ought never to have been rendered. The disallowance of the credit, however, does not rest upon the theory of any error or wrong in the judgment. The credit was

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disallowed by the Probate Court because the payment for which the credit is claimed was premature and unauthorized, and not because the judgment was invalid or wrong. Hardy made the payment in advance of any order of payment and prior to the expiration of the first year's administration, and before it was known whether there would be assets applicable to the fifth-class debts. It was upon that ground that the credit was disallowed. If an administrator pays claims of the fifth or any subsequent class without an order, he acts at his own risk. Claims in these classes are not to be paid until the prior classes are satisfied. There may be nothing to apply to the fifth class, and, if anything, not sufficient to satisfy them in full, in which case they must be paid *pro rata*. If an administrator were permitted to pay allowed claims in his discretion and charge the estate, a portion of the creditors might be paid in full while others of the same class would get nothing. No such practice can be tolerated. In my view the Probate Court was correct in its determination and the Circuit Court wrong in its reversal.

This substantially disposes of the case, but it may be well to refer to another ground upon which the disallowance of the credit is sought to be justified. The allowance of the credit was resisted upon the further ground that the payment was made fraudulently. It was in evidence that the claim allowed and classified as already mentioned was allowed in favor of an insolvent third party, who was indebted to the estate in the sum of \$200 upon a separate demand. The set-off was not credited, so that the insolvent got a judgment for \$250 when there was a balance of only \$50 actually due him.

The evidence shows that Hardy knew of the set-off, knew that there was a balance justly due against the estate of only \$50 when he paid the \$250. The original claim in favor of the insolvent was allowed December 20, 1867. Hardy's letters were revoked on the 24th day of that month, and the \$250 was paid by him on the same day.

If the payment was made corruptly and with a view to hamper, embarrass and defraud the estate in respect to the set-off, I do not think, under the circumstances already adverted to, that

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the judgment can be successfully invoked in justification of the fraud.

With the concurrence of the other judges, the judgment and order of the Circuit Court will be reversed and the judgment of the Probate Court affirmed.

CATHERINE FROELICH, Respondent, v. ATLAS LIFE INSURANCE COMPANY, Appellant.

1. *Forfeitures not favored.*—Forfeitures, if legally established, must be enforced, but are not favored.
2. *Insurance companies—Premium notes, forfeiture of for non-payment waived by subsequent receipt of money.*—The forfeiture of an insurance policy for non-payment of the premium note will be waived by subsequent receipt, without objections, of the money by the company.

Appeal from St. Louis Circuit Court.

Bakewell & Farish, for respondent.

T. Polk, for appellant.

BLISS, Judge, delivered the opinion of the court.

This is a suit upon a life insurance policy issued in favor of plaintiff upon the life of her husband. The petition describes the contract very briefly, alleges the death of the assured, that all premiums were paid up to his death, that due notice and proof of death were given with demand, etc., and that plaintiff and deceased had fulfilled all the conditions of the policy. Defendant admitted the contract, the notice and proof of death, but denied that the premiums were paid and the conditions, etc., fulfilled. Specifically the answer set out that at the time of issuing the policy it was agreed that the premiums should be paid quarterly, and for the annual premium of \$93.60 deceased paid one-fourth down, and for the balance gave his three promissory notes at three, six and nine months, and that the last note fell due before his death, which he failed to pay. The answer further sets out one of the conditions of the policy not contained in the

petition, to-wit: that it was not to take effect until the first premium was actually paid, and alleges that on the 19th of August, the note having fallen due on the 15th, the deceased having died or being mortally sick, between three and four o'clock P. M., the plaintiff, fraudulently representing that he was living and well, induced the defendant, trusting to such false representations, to receive the amount due on said note. The reply did not deny this condition of the policy, but denied the fraud, alleging that the note was paid on the 19th before the death of Froehlich.

The case was submitted to the jury under instructions satisfactory to defendant's counsel, and a verdict was given for the plaintiff. Upon motion for new trial the judge who tried the cause gave as a reason for overruling it, and his remarks are embodied in the bill of exceptions, that his instructions upon the breach of the condition in not paying the note were too favorable to defendant; that he now believed that the recital in the policy that the first year's premium of \$93.60 was paid was conclusive upon the company and could not be contradicted, and hence the alleged fraud was immaterial; although, under the instructions as given upon this point, he thought the verdict was contrary to the evidence. The defendant now objects to the consideration of this recital in the policy upon two grounds: first, the policy was not submitted in evidence, was not in the record, and the court could not consider it further than as set out in the pleadings; and, second, the recital was not conclusive.

The objection upon the first ground is well taken. The policy is not in the record, and the pleadings fail to set out any receipt in full of the first year's premium. The pleadings were drawn, the evidence was offered, and the case was submitted to and passed upon by the jury upon the theory that the condition admitted by the pleadings had been performed by the plaintiff and her husband. The court had no right to go out of the record and inspect the policy to see whether it did not contain some other provision upon which a recovery might have been had without reference to the condition. That matter was *coram non judice*, and the same reason that made it improper for the Circuit Court to consider the question should prevent us from doing so.

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It is an important question — one that has not been specifically considered by this court — and I do not feel at liberty to venture an opinion until a case arises that shall demand its investigation. I should, however, remark that the case of *Sims v. State Ins. Co. of Hannibal*, *ante*, p. 54, and cited by defendant's counsel, is no authority upon that question, for the reason that it was not raised or considered. The issue there was very much like the one in this case. The court only held that the arrangement to receive the money after it was due waived the forfeiture and preserved the policy; and what we might have held if the pleadings had placed the plaintiff's right to recover, so far as the payment of the premium was concerned, upon the language of the policy acknowledging its receipt, does not appear.

But how do we know that the court placed its refusal to give a new trial upon the grounds suggested in the remarks of the judge? Those remarks are no part of the record, no more so than the policy, and if we are to be confined strictly to it we shall find that all the premium had been paid except the last note, that it fell due on Thursday, the 15th, that the insured died about noon on Monday, the 19th, of cholera, and that the last note was paid on that day. Upon the charge that defendant's officers were induced to receive the amount by the fraudulent representations of the plaintiff, there was conflicting testimony; the jury believing that offered by the plaintiff, and the court, according to remarks of the judge outside the record, believing the witnesses of defendant. But the record only shows that a motion for a new trial was made and overruled, and it does not show any errors of law, at least as against the defendant, nor do we see any equities in the defense that should induce us to give it any privileges. Defendant issued a life policy to the plaintiff upon the life of her husband, and as an inducement to take it gave time upon part of the premium, and now, for want of its prompt payment, seeks to enforce a forfeiture of the policy. Forfeitures are not to be favored. If legally established we must enforce them, but it would be wrong to depart from the ordinary mode of administering the law to facilitate them. The record shows that the question of forfeiture, or rather its waiver by the

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subsequent receipt of the money, was fairly submitted to the jury and found against the defendant, and with that finding its officers should be satisfied.

The other judges concurring, the judgment will be affirmed.

F. P. DALTON *et al.*, Respondents, v. JOHN E. MOWRY,
Appellant.

1. Judgment affirmed.

Appeal from St. Louis Circuit Court.

T. S. Espy, for appellant.

C. C. McClure, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is a suit for partition in which the appellant was joined as a party defendant. He answered, for substance admitting the allegations of the petition, but averred that he had made improvements upon a portion of the common property, for which, as he claimed, he ought to be considered and compensated in dividing up the estate. These allegations were replied to and traversed.

When the cause came on for trial the appellant failed to appear, and a decree for partition was rendered in accordance with the prayer of the petition. Subsequently the appellant moved to set aside the decree, founding the motion upon the facts detailed in an affidavit filed therewith. The motion was overruled, and the appellant excepted and brings the case here by appeal, the estate in the meanwhile having been divided and the report of the commissioners appointed in the case duly approved.

The affidavit upon which this motion was founded shows no such diligence that we can say the discretion of the Circuit Court was unsoundly exercised in overruling the motion. On the other hand, the action of the court seems to have been quite proper

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and befitting the case. No errors are shown in the record which would warrant a reversal, and the judgment will accordingly be affirmed. The other judges concur.

JAMES M. BRYANT, *et al.*, Respondents, v. DAVID L. HAWKINS,
Appellant.

1. *Partnership — Members liable, jointly and severally — Agreements between, etc.*— Under the statute (Wagn. Stat. 269, § 1) the members of a collecting firm are liable jointly and severally for the money collected. And one member will be liable for money collected by the other, although the partnership had been dissolved and it had been agreed that the former should wind up the business.

And in suit against the former for proceeds of money collected by the firm, the fact that defendant notified the sheriff not to pay over the money to his partner will not exonerate him.

Appeal from St. Louis Circuit Court.

Slayback & Haeussler, for appellant.

In this case the suit is not brought against the firm. Hawkins alone is sued. There is no proof that he ever collected the money. Therefore the respondents failed to make out their cause of action. (Cummins v. McLean, 2 Ark. 402; Fraser v. Roberts, 32 Mo. 461; 2 Tidd's Pr. 919; 11 Wend. 374; Andrews v. Lynch, 27 Mo. 167; Welch v. Bryan, 28 Mo. 30; Syme v. Str. Indiana, 28 Mo. 335; 2 Wagn. Stat. 1058, § 1; Beck v. Ferrara, 19 Mo. 30; Link v. Vaughan, 17 Mo. 585; Butcher v. Death & Teasdale, 15 Mo. 271; Jones v. Londerman, 39 Mo. 287.)

Glover & Shepley, and *J. N. Litton*, for respondents.

Can plaintiff recover on facts proved? Where A. and B., a law firm, contract with a client to collect money for him, and the firm obtain judgment as attorneys of record, issue execution and collect part of the money, B. can not, without any notice to his client, release himself from his contract and from his responsibility for money collected by his partner, by dissolution and he

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will be liable for money collected after any such dissolution. (Pars. Partn. 395-6; 4 Carr. & P. 108; Kings v. Smith, 12 Sm. & M. 669; Wilkinson v. Griswold, 4 McCord, 259; Poole v. Gist, 23 Mo. 76; Dean v. McFaul, 31 Ill. 62; Smith v. Tuley, 15 N. Y. 471; Briggs v. Briggs, 29 Penn. St. 293; Cook v. Bloodgood, 7 Ala. 683; Cook v. Bloodgood, 2 Blackf. 22; Polland v. Rowland, 32 Miss. 17; Myers v. Field, 37 Mo. 434; 45 Mo. 365.) If A. and B. make a contract, A. can not release himself from his contract without the consent of B., still less without even notice to B. The fact that A. is a firm, composed of two, does not give it any greater rights to break its contract than if it was only a single individual.

WAGNER, Judge, delivered the opinion of the court.

This was an action to recover of defendant money which it is charged he collected as an attorney at law for plaintiffs upon two certain notes against one John H. Stokes. The case shows that defendant, in connection with one Moore, constituted a law firm at Cape Girardeau under the name and style of Moore & Hawkins, and, as such, they received the notes of the plaintiffs for collection and gave a receipt therefor in the name of the firm. Suit was instituted upon the notes and duly prosecuted to judgment. Execution was issued upon the judgment and the money made by the sheriff. Moore & Hawkins appeared as attorneys of record. The firm was dissolved before all the money was paid, and Hawkins notified the sheriff not to pay any money on that account to Moore. But notwithstanding this warning Moore obtained the money, appropriated it to his own use, and is now a non-resident. This suit is brought against Hawkins individually to recover the amount so collected by Moore and converted to his own use.

It is objected that as the petition declares on a liability against Hawkins, and as the evidence shows that the money was received and appropriated by Moore, therefore the judgment which was rendered for the plaintiff should be reversed. But we are of the opinion that the petition is sufficient according to the case as made out. The firm was certainly liable jointly and severally

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for the money collected. Under the statutes of this State all contracts which are joint only by the common law are to be construed as joint and several. (1 Wagn. Stat. 269, § 1.) And where a joint liability is incurred, an action will lie against one of the joint contractors for the act of another. Moore and Hawkins were jointly and severally liable for all the contracts and undertakings arising in the prosecution of their business. The dissolution of the partnership, and the agreement between them that Hawkins should wind up the business, can not affect the rights of the plaintiff. And the fact that Hawkins notified the sheriff not to pay the money to Moore will not exonerate him. It might, under certain circumstances, furnish a remedy against the sheriff, but can not in anywise impair the obligation of the defendant Hawkins to the plaintiff.

The principle is universal that no dissolution of any kind will affect the rights of third parties who have had dealings with the partnership, without their consent. Parties may agree as they please about their joint property, and their agreements will be valid so far as they do not affect the rights of third parties; but if they do have that effect, they will be utterly and wholly void. The collection of the notes was a partnership duty, and it continued, so far as the plaintiffs were concerned, with each member after the dissolution of the firm. The credit was given to the firm, and the dissolution did not operate as a release of the obligation.

Something has been said about part of the money having been paid to Moore when he was acting with the enemies of the government, but we can not see on what principle that can be invoked to prejudice the just claims of the plaintiffs.

Judgment affirmed. The other judges concur.

ELIZABETH E. WATSON *et al.*, Respondents, *v.* CHARLES D.
BIGELOW *et al.*, Appellants.

1. *Agency—Principal, ratification of acts of agent by—Appropriation and disposal of property.*—Where an agent, without the authority of his principals, borrows money and invests it in property, the principals, by afterward appropriating and disposing of the property for their own benefit, will be held to ratify the act and become liable; and the measure of their liability is the amount of money borrowed, and not that realized by the sale.

Appeal from St. Louis Circuit Court.

E. T. Allen, for appellants.

I. Nothing short of an express ratification, with full knowledge of all the facts, would render the principal liable in the case at bar. There was no evidence of any such express ratification.

II. The verdict of the jury in this cause must of necessity have been for a smaller sum than the one in the record. Under the instructions, as given by the court below, plaintiff could only recover for the value of the property sold by defendants after knowledge of plaintiff's claim, etc. The evidence adduced by plaintiff is to the effect that the property did not exceed in value \$450, yet the verdict was for the sum of \$600, with interest. This point was brought before the Special Term of Circuit Court on the motion to set aside verdict and for a new trial, yet the motion was overruled. (*Fury v. Merriman*, 45 Mo. 500.)

J. N. Straat, for respondents.

BLISS, Judge, delivered the opinion of the court.

Defendants were manufacturers of boots and shoes in New York city, and in July, 1866, established an agency in St. Louis under the sole management of one Charles T. Hay. In November following, the plaintiff, Mrs. Watson, through her husband, William C., loaned to said Hay the sum of \$600, which belonged to her separate estate, and took his note. The money went into the business of the house, and most of it was expended in the purchase of a horse, buggy and harness, to be used by

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agents in soliciting business. Its use was known to the plaintiffs and it was borrowed for the house, the agent, Hay, signing the note as he was accustomed to sign receipts, bills, etc., with his own name, without using the name of his principals or the word "agent." But it appears that he was forbidden to run the house in debt, and made no report to his employers of this loan, and his reports to them indicate that he designed to conceal it from them. In January, 1868, the house not prospering, the defendants sent out two of their partners to examine into their business, and finding that Mr. Hay was behind in his private account and had overdrawn his salary, they compelled him to resign, and took possession of all the property, including the horse and buggy. This note was presented to them; they were informed as to the use made of the money borrowed upon it, but they refused to pay it, claiming that Hay had no right to borrow money, and that he had obtained this to cover up his defalcation. They, however, retained the property, and afterward sold it. Evidence was given bearing upon Watson's knowledge of Hay's alleged object in borrowing the money, but as defendants' instructions upon this point were given to the jury, it is unnecessary to consider it.

The court gave the following instruction, to which defendants excepted: "If the jury believe from the evidence that said Hay was duly authorized by defendants to conduct and carry on their business in St. Louis, and that he borrowed from the plaintiffs the \$600 as alleged by the plaintiff in his petition, and that said money so borrowed was used in the business of defendants, and that defendants received the benefit of said money so obtained; notwithstanding the jury may believe from the evidence that said Hay had no authority to borrow money on the credit of his principals and could not bind them therefor, still, if the jury find that defendants retained the possession of the property bought with the money so borrowed, after they knew of the fact that with the money borrowed the property had been bought, and sold said property after such knowledge, and received the proceeds of such sale, it is in law a ratification of the act of their agent to that extent, and they became liable for the money, the benefit of which was received by them, and the jury will find for the plaintiff

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to that amount." By this instruction the court would only hold the defendants for the amount for which the property was sold. The jury, however, gave a verdict for the \$600 and interest, for which judgment was rendered. And upon the supposed state of facts this verdict is right. The instruction seems to have been drawn upon the supposition that the plaintiff had an interest in property bought with her money, and that defendants should account for its proceeds. But their liability arises from the fact that they received the benefit of the money borrowed, and ratified the unauthorized act of their agent by appropriating and disposing of the property. His act being so ratified, they became bound by the contract made for their benefit without reference to the amount for which they sold it. Hence that cuts no figure in the case. If the money borrowed went to the use of the St. Louis house of defendants, and if, when they ascertained the fact that it had been borrowed for them and expended in the purchase of specific property employed in their business, they retained the property and sold it, the note, upon every principle of justice, became their own debt, and so the jury should have been instructed. We are cited to *Bryant v. Moore*, 26 Me. 84, as a modification of this doctrine of implied ratification. The general doctrine is thus clearly stated by the court: "There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it." But in that case the agent, in exchanging an ox of the plaintiff, had warranted him without the plaintiff's knowledge, the other party knowing that he had no authority to make the warranty. Notwithstanding the plaintiff had received the defendant's ox in exchange, the court held that he was not bound by the warranty because it did not come to his knowledge until too late to repudiate the exchange without loss to himself. And in a case supposed by the court to illustrate its view, the person seeking to take advantage of the contract of the agent knew that the agent was exceeding his authority. Defendants in the present case would have received no injury from the

specific transaction in controversy had they repudiated the contract when it first came to their knowledge, but rather a benefit.

Defendants' counsel have raised a multitude of points and questions, but this view deprives them of their importance; and the other judges concurring, the judgment will be affirmed.

STATE OF MISSOURI, Respondent, v. CHARLES VASEL, Appellant.

1. *Criminal law—Misdemeanor—Constable, extortion by—Construction of statute.*—It belongs solely to the justice of the peace to determine the compensation to be allowed his constable for receiving and keeping property levied on. And until that question is determined by the justice, the exaction of any money from the debtor by the constable for such services is extortion and a misdemeanor within the meaning of the statute (Wagn. Stat. 488, § 19).

Appeal from St. Louis Court of Criminal Correction.

A. J. Baker, for respondent.

F. & L. Gottschalk, and *Fisher & Rowell*, for appellant.

CURRIER, Judge, delivered the opinion of the court.

The complaint in this cause is founded upon the statute which makes the taking of illegal fees, under the color of official authority, a misdemeanor (1 Wagn. Stat. 488, § 19). The statute is expressed in the terms employed to define extortion at common law, and is designed to prevent and punish that offense. (1 Bish., § 424.)

The complaint charges that the defendant was a deputy constable of St. Louis township; that, as such, he had in charge an execution against one Flederman for levy and collection; and that the defendant, in effecting the collection, corruptly and unlawfully, and under color of his office, extorted from Flederman the sum of five dollars. That is the substance of the complaint.

The evidence disclosed substantially this state of fact: The defendant levied the execution upon one of Flederman's horses, and kept and detained it for one hour or thereabouts, when Flederman appeared, paid the execution and all the usual costs,

together with five dollars which the defendant exacted as a condition to the surrender of the horse and as compensation for receiving and keeping the animal subsequently to the levy. The exaction of the five dollars is charged to be illegal and extortionate.

The statute (1 Wagn. Stat. 627, § 18) allows a constable fifty cents for serving an execution, and for receiving and keeping property levied upon, such "compensation as may be awarded by the justice" issuing the process. At the trial defendant's counsel asked various instructions based upon the theory that the justice issuing the execution was the sole judge of the propriety of the charge, and that no prosecution for extortion founded upon that charge would lie until the justice had determined it to be excessive and unwarranted. These instructions were refused, and the defendant complains of the action of the court in that respect.

If it belonged solely to the justice to determine the compensation to be allowed for receiving and keeping the property—and that point may be conceded—the interested constable was certainly traveling out of the line of his duty in determining the compensation for himself. He at least had no jurisdiction over the question. His compensation for receiving and keeping the property was wholly under the control of the justice; and it was also for the justice to settle the preliminary question, whether there had been any such "receiving and keeping" as to warrant any allowance at all beyond the statutory fee for serving the execution. Until the justice passed upon these questions it was not warrantable for the constable to exact anything. Until then his claim was merely inchoate and immature, requiring the sanction of the justice to give it force and legal validity as a demand to be enforced against the execution debtor.

If these views are correct, it follows that the defendant exacted and received from the execution debtor a sum of money to which he was not at that time legally entitled, and to which he has shown no right; and that is extortion, the money being obtained under color of official authority. It is a mistake to suppose that extortion consists alone in taking illegal fees, or more fees than are allowed by law. It is an offense to exact them before they are due. A coroner is guilty of extortion who refuses to take

the view of a body until his fees are paid; and so "if an undersheriff obtains his fees by refusing to execute process till they are paid, or takes a bond for his fees before execution is sued out." (1 Russell on Crimes, 143; and see the statute.)

It was clearly not the intention of the Legislature to permit the constable to make his own terms and exact such fees as he might deem proper, and then refer the matter to the justice for adjudication. That is reversing the proper order of proceeding, and opens the way to unjust exactions. The adjudication must come first. If the constable and the debtor fail to agree upon the proper charge to be made, and the constable persists in his claim, he must refer the matter to the justice to award upon before he proceeds to exact and collect compensation for the kind of service in question. Doubtless this may be done in a summary way; but until it is done the constable makes exactions at his peril.

The constable must be presumed to have known the law, and the presumption in this case is most reasonable. He knew that he had no right to determine his own compensation for the hour's keeping of the horse; he knew that it was for the justice to fix the compensation. Had he promptly referred the matter to the justice, in the meanwhile detaining the horse, the case would have presented an entirely different aspect. But he took a different course and must abide the consequences. The defendant's instructions were properly refused.

It is obvious from what has already been said that the reasonableness of the five dollar charge was not a material matter. Its exaction prior to its allowance was unauthorized and illegal, independently of the question respecting the reasonableness of the amount claimed. The constable had no legal right to exact the money as a condition to the surrender of the debtor's property, the claim not having been allowed by the proper authority.

The objections taken to the complaint are not available upon a motion in arrest. They are of a technical character, and do not affect the substantial merits of the complaint. (*Pickering v. Mississippi Valley Telegraph Co.* (See p. 457.) Whether the execution was upon its face directed to the constable or to the

constable's deputy was a matter of no importance. The deputy levied it as a legal and valid process, and made the collections in virtue and under color of his office.

Judgment affirmed. The other judges concur.

**CHARTER OAK LIFE INSURANCE COMPANY v. MATILDA BRANT,
Appellant; PETER J. HURCK, TRUSTEE, AND HENRY STAGG,
Respondents.**

1. *Insurance, life—Policy of, under statute, can not be assigned.*—A policy of insurance effected by the husband on his own life for the benefit of his wife and children, where the amount of premium actually paid was more than \$300, may be assigned so as to bar the wife from recovering the proceeds of the policy in case of her survivorship. (See Wagn. Stat. 936, §§ 15, 18.) But *semble*, that under section 15 *supra*, such assignment would be void, even though she join her husband therein, where the annual amount of the premium was less than \$300.
2. *Insurance, life—Insurance by husband for benefit of wife—Statute an enabling act.*—At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. But the statute (Wagn. Stat. 936, §§ 15, 18) is an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman, for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children.

Appeal from St. Louis Circuit Court.

W. B. Napton, with Clark & Dillon, for Mrs. Brant.

I. That the assignment of the husband was invalid against the wife's title by survivorship is well settled, by our own decisions as well as the English and other American authorities. (Wood v. Simmons, 20 Mo. 363; Craft v. Bolton, 31 Mo. 355; Purdew v. Jackson, 1 Russell, ch. 1; Honor v. Marton, 3 Russell, 65; Sto. Eq., § 1413; Hornsby v. Lee, 2 Madd. 16.)

II. The only question, then, is whether the wife was capable of parting with her reversionary equitable interest in this policy. I insist that such a power would be against the policy of the

statutes, which allow this kind of insurance, and that it is unknown to the common law, or to that system of equity law which has created and regulated separate estates in married women. The words "sole and separate use," which the insurance companies have inserted in this policy, are unnecessary and superfluous; or, if designed to have the force of converting this debt into a present separate estate, and therefore liable to be parted with by the wife during marriage, utterly defeats the intent of all parties in its creation, which is to provide a fund for the wife, after the death of her husband, and not one to support her or provide for her imaginary or real wants during coverture. It is a mere pleonasm in terms to give the wife a fund to be possessed, after the death of her husband, to her sole and separate use. It can not be otherwise than to her sole and separate use if the enjoyment is fixed after the dissolution of the marriage by death. If the insertion of the words "sole and separate use" enables her to dispose of it during marriage, and thus cut off the children, as well as herself, from its enjoyment at the period named in the policy, it is a contradiction in terms and an anomaly in law to make it only available on the death of her husband. There is no precedent to be found of a separate estate in the wife, in land or chattels or choses in action, capable of being parted with by the wife alone, where it is only to come into possession on the death of the husband. Such estates are created by modern equity law to protect them against the husband, and they are present interests, or interests which, by possibility, may fall into possession during the life of the husband. (See Sto. Eq., § 1413.) Here Judge Story distinctly and clearly states the rule of courts of equity, that even a wife's separate property can not be disposed of by her unless it is also present and immediate property; and by the word "immediate," which is used in contradistinction to reversionary, I understand such property as is in possession, or may fall into possession during the coverture. It certainly can not apply to property which, by the terms of its creation, is not to be enjoyed until the coverture ceases. (See also 2 Roper on Husb. Wife, 187.)

III. This policy, like the one in New York, was for the benefit of the wife and children, and if the wife died before the husband the interest would vest in the children. Could the wife, then, dispose of their interest as well as hers?

IV. If this policy is understood to vest such a separate estate in the wife as may be passed by her assignment, then, under our decisions (*Whitesides v. Cannon*, 23 Mo. 457), it is an interest subject to be taken by her creditors or her husband's creditors during his life, which is manifestly against the intent of the policy and all parties to it.

P. E. Bland, for Hurck and Stagg, respondents.

I. We do not claim that the husband alone, or the husband and wife joined, or the wife alone, are competent to assign the wife's choses in action, where there is no separate estate vested in her, so as to bar by such assignment her right of survivorship. That they are not competent, is settled by this court in *Wood v. Simmons*, 20 Mo. 363, and *Craft v. Bolton*, 31 Mo. 355.

II. We claim: 1st. That if the contract of insurance in this case operated to settle a separate estate, in the fund assured, in the appellant, then she was competent to assign the interest, and it passed to respondents, Hurck and Stagg, by her assignment. (*Coates v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Mo. 457.) 2d. That if anything passed to her under the policy, it was a separate estate in the fund. By the express terms of the contract the interest passed (if at all) to her "for her sole and separate use." These words create a separate estate. (1 Washb. Real Prop. 413, §§ 4, 5; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 11.)

The point has nothing in it that a separate estate in a wife can not be vested in a fund to be reduced into possession after the death of the husband. (1 Washb. Real Prop. 59, §§ 1, 7, 8.)

The estate is necessarily a vested interest—a present estate—though the chattel itself may not be in possession nor capable of being reduced into possession until some future time.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill of interpleader brought by the plaintiff against Matilda Brant, widow of Henry B. Brant, deceased, and Hurck and Stagg, praying to be allowed to pay into court the proceeds of a certain policy of insurance on the life of Henry B. Brant, deceased, and asking that the defendants be required to interplead in order to have a determination of their respective rights. The court below adjudged that Hurck, as trustee of Stagg, was entitled to the money, and from that decision Mrs. Brant appealed. The policy was issued for \$5,000, payable to the sole and separate use of Mrs. Brant after the death of her husband. The annual premium was \$343.10, and the demurrer admits that the premium was paid by Brant. Brant, in his lifetime, borrowed money of Stagg and assigned the policy as collateral security, Mrs. Brant joining with him in the assignment; and he having died without making payment, the question now is whether the assignment concludes or bars Mrs. Brant from recovering the proceeds of the policy. With respect to reversionary choses in action and other reversionary, equitable interests of the wife in personal chattels, the doctrine has been for a long time well settled and in a manner most favorable to her rights; for no assignment by the husband, even with her consent and joining in the assignment, will exclude her right of survivorship in such cases. The assignment is not and can not from the nature of the thing amount to a reduction into possession of such reversionary interests; and her consent during the coverture to the assignment is not an act obligatory upon her. (2 Sto. Eq. Jur., § 1413; Wood v. Simmons, 20 Mo. 363; Craft v. Bolton, 31 Mo. 355.)

But the question to be considered is whether this case falls within the above-mentioned rule. If the policy was a chose in action, or an equitable interest absolutely belonging to the wife within the reasoning of the doctrine, there could be no doubt; but the case is peculiar and distinguishable. It is an interest designed for her benefit, but the consideration immediately moves from the husband and is dependent on his action.

The statute in reference to married women provides that it shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her, and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but such exemption shall not apply when the amount of the premium annually paid shall exceed \$300. (2 Wagn. Stat. 936, § 15.)

The eighteenth section of the same act makes it apply to all policies, whether the same were effected by the wife herself or by her husband for her benefit, either before or after the passage of the law, and provides for the inurement of the money to the separate use and benefit of the wife and her children, if any, independently of her husband and of his creditors and representatives. This statute was copied from the New York law of 1840, and the construction which the courts of that State have given to it will be presently adverted to. A similar statute prevails in Wisconsin, and the court there holds that where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit, and himself paid the premiums thereon, he may dispose of it by will or otherwise. (*Kerwin v. Howard*, 23 Wis. 108.)

The court in its reasoning seems to have no doubt about the power of the husband, with the consent of the company, to change the policy, or to assign it as a means of credit or security; and that in a case where he had paid the premiums he would have the right to dispose of the policy in the absence of the statute, and it was not believed that the Legislature intended to deprive him of it by that provision. In *Eadie v. Slimmon*, 26 N. Y. 9, it appears that the policy recited the payment by Mrs. Eadie of the premium for the first year, and for the like premium to be paid in advance every year thereafter. The company insured the life of the husband in the sum of \$2,000 for her use and

benefit. The husband and wife assigned the policy to Slimmon in payment of, or as security for, an alleged indebtedness of the husband. Slimmon threatened Eadie with a criminal prosecution for embezzlement; the wife was wrought on through fear, and thrown into the greatest agony, and the policy was assigned through apprehension of such a prosecution. After the death of the husband, Slimmon claimed the money on the policy, but the court held the assignment void, having been extorted by force and coercion which overcame the free agency of the wife. This was the principal reason upon which the decision was based, though Mr. Justice Smith at the close of his opinion stated that the policy was taken under the act of 1840; that it was the intent of that statute to make such policies a security to the family of a married man and a provision for their use and benefit, and that this intent would be defeated if they were held assignable by the wife like ordinary choses in action belonging to her in her own right as her separate property.

Upon a motion for a rehearing the court adhered to its previous opinion, and Denio, J., said that the statutory provision was special and peculiar, and looked to a provision for a state of widowhood and for orphan children, and that it would be a violation of the spirit of the provision to hold that a wife insured under the act could sell and traffic with her policy as though it were realized personal property or an ordinary security for money. But no doubt was expressed by the court on either occasion about the assignability of the policy had no statute regulations intervened to render it invalid. It appears that there never was any serious doubt about a life policy being assignable, and it has been observed that without the power to assign, the insurance on lives would lose half its usefulness. (Ang. Fire and Life Ins., § 325 *et seq.*) At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent. (3 Kent's Com., 10th ed., 483; but see McKee v. Phoenix Ins. Co. 28 Mo. 383.) The statute, therefore, may be considered in the light of an enabling act. It enables the husband to effect

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a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives.

It also makes it lawful for a married woman herself, and for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children. The statute was founded in charity and intended to subserve a beneficent object, and in a case falling within it, I should be disposed to give it the most favorable construction to carry out its humane purpose. But it is expressly provided that to secure the exemption or immunity on policies in favor of married women, the amount of premium annually paid shall not exceed \$300. The law did not intend that the husband should withdraw any greater amount from his means or his creditors to be expended for such a purpose. As the premium was greater in this case, the policy is withdrawn from the operation of the statutes, and does not come within the provision granting it an entire and absolute exemption in favor of the wife. As a policy not governed by the statutes, I entertain no doubt about its transferability; and the assignment having been voluntarily made by Mrs. Brant and her husband for a valuable consideration, with the assent of the company, I think it should be held valid and that the judgment should be affirmed. The other judges concur.

ROBERT M. HENNING *et al.*, Appellants, v. THE UNITED STATES INSURANCE COMPANY, Respondent.

1. *Practice, civil — Pleadings — Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. But in suits on contracts of this nature the contracts must be distinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.
2. *Corporations — Insurance companies — Parol contracts can not be made when charter or by-laws call for written agreements.*—Corporations, when

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they are not restrained in any particular manner by their charters, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. And there are adjudicated cases showing that at common law, where no particular mode of insurance is pointed out in the charter, insurance companies may make verbal contracts of insurance which are binding and valid. But where a company's charter declares that "all conditions of policies issued by said company shall be printed or written on the face thereof," and its by-laws require that the president "shall sign all policies or other contracts by which the company shall be bound," and "that every proposal for insurance shall be by written application, signed by the applicant or his agent," such company can make no original or binding contract by parol.

Appeal from St. Louis Circuit Court.

T. T. Gantt, for appellants.

A parol contract of insurance, such as (we say) was made with defendant in March, 1864, acted upon and carried into effect as it was, is binding and enforceable at law. That such a contract may be made, and that it binds the corporation, though without writing, has been repeatedly decided by courts of the highest authority, viz: *Kennebec Co. v. Augusta Insurance & Banking Co.*, 6 Gray, Mass., 204; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb. 75; 19 N. Y. 305; *Halleck v. Ins. Co.*, 2 Dutch., N. J., 268-76; *Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son*, 31 Ala. 711; *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 321.

The rule laid down by Judge Curtis in 19 Howard, which has been adopted in Massachusetts, New York, New Jersey and Alabama, is entirely compatible with the statute law of Missouri.

Under the act of 1845 (R. C. 1845, p. 232, § 8), the capacity of a corporation to make a parol contract, and the liability of a corporation to be bound by an implied contract, differs in no respect from that of an individual or natural person. This section is part of the charter of the defendant. All corporations created after the passage of that act are subject to the disabilities and restrictions of the general law on the subject. But as to this provision in section 8, it is believed that it became operative immediately on its passage, with respect to all existing corporations. When, in 1855, the charter of the defendant was given,

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the seventh and fifteenth sections of the act of 1845 were declared to be not a part of its charter. This is quite equivalent to saying that the other sections of that act were applicable to the new company.

So far as the case of *Plahto v. Merch. & Manuf. Ins. Co.* (38 Mo. 248) is concerned, it is submitted that all which is said in that instance respecting the non-validity of verbal contracts for insurance is *obiter dictum*; the question was not presented to the court then, whether such a contract was binding. No reference appears to the authorities now cited, and indeed the decision is rather one that asserts the general rule that is common to natural and artificial persons alike than one which exempts a body politic from liability. The more recent case of *Mound City Mutual Ins. Co. v. Curran*, 42 Mo. 374, agrees with *Plahto v. Merch. & Manuf. Ins. Co.*, *supra*, and it was no doubt upon the authority of these cases that the Circuit Court decided the case at bar. But the precise point which this case presents has now been argued for the first time before this court. If there is a contradiction between the law declared by the courts of Massachusetts, New York, New Jersey, Alabama and the United States, and that which has been laid down *obiter* by this court on a matter of commercial law which ought to be uniform throughout the land unless controlled by positive statute, we are well warranted in asking this court to pause before making a different rule inflexible. According to the decision of this case the rule will henceforth be fixed in Missouri.

Geo. P. Strong, for appellants.

It was competent for the parties, by their course of dealing, to show the sense in which they used the terms employed in their contract, and to give the contract a construction different from the natural and ordinary signification of the words used in it. It was also competent for them to vary the terms of the contract by parol. (*Chapman v. Black*, 5 Scott, 530, 533; *Bunce v. Beck*, 43 Mo. 266; *Eyre v. Marine Ins. Co.*, 5 Watts & Serg. 122; *Mead v. De Golyer*, 16 Wend. 632; *Chit. Cont.* 89; *Protective Ins. Co. v. Wilson*, 6 Ohio St. 533, 560; 25 Barb. 189; 23

How. 420; Kennebec Co. v. Augusta Insurance & Banking Co., 6 Gray, 204, 214; Mobile Marine Dock & Mutual Ins. Co. v. McMillan & Son, 31 Ala. 711; Warren v. Ocean Ins. Co., 16 Me. 439.) It was competent for the parties to make a valid contract of insurance by parol, and such contract ought to be enforced. (First Baptist Church v. Brooklyn Ins. Co., 18 Barb. 69; same case, 31 N. Y. 305; Kennebec Co. v. Augusta Insurance & Banking Co., *supra*; Mobile Marine Ins. Co. v. McMillan & Son, *supra*; Com. M. M. Ins. Co. v. Union M. Ins. Co., 19 How. 318; 11 Paige Ch. 555; 4 Sandf. Ch. 408; Palm, Adm'r, v. The Medina Ins. Co., 20 Ohio, 529; E. Carver Co. v. Manuf. Ins. Co., 6 Gray, 214.)

The case in Ohio (16 Ohio, 148), and that of The Mound City Co. v. Curran, 42 Mo. 374, are not in point. In them the policy had become absolutely dead, and the decisions merely hold that in the absence of all proof of authority it was not competent for the secretary, either orally or by writing, to issue what in effect was a new policy. In the case at bar there was a valid subsisting policy, all the time so treated and so regarded by both parties, and one that the courts would enforce. In this case it was mutually agreed that defendant's policy should cover just such risks as those now insured for, and both parties acted upon this construction for years and until this loss. The plaintiffs entered upon the policy books all their shipments, irrespective of the points of shipment or of destination, and the defendant accepted the risks and received the premiums. No such proof appeared in the Ohio case, nor in the Mound City case, *supra*, nor did any such facts appear in the Plahto case, 38 Mo. 248. In the latter case both parties had expressly stipulated that the policy should only cover certain risks "in such sums, on property, from and to such places and on board such vessels, as shall be specified by application and mutually agreed upon and written on this policy." When this policy was signed, some matters were left open, but, by its express terms, before it could take effect everything must be closed; there must be an application, a mutual agreement, and a writing of the risk upon the policy. Nothing of this kind was required of Henning & Wood-

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ruff. They were authorized and required to enter all their shipments. Neither party could refuse to be bound. Justice Holmes recognized the distinction in the *Plahto* case, 38 Mo. 255. Bodley was the secretary and general agent of defendant and had authority to make such a contract. He had been making just such contracts for nine years, and the defendant had received the benefits growing out of them. These benefits, during the last eighteen months prior to the loss in this case, had amounted to \$50,000. All this the company received, without a word of dissent, upon contracts of insurance almost identical with that upon which this suit was founded. Such dealings, assented to by the corporation, were proof sufficient of authority in the agent; and from such a course of dealing the law will imply the authority of the agent, and also the existence of the contract itself. (*Bank of the United States v. Dandridge*, 12 Wheat. 68, 70; *Gen. Stat.* 1865, p. 327, § 6; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Bank of Vergennes v. Warren*, 7 Hill, 91, 94; *Bank of Columbia v. Patterson*, 7 Cranch, 305; 27 Conn. 538, 554; 6 Barb. 576.)

The provisions of the charter in the case at bar ought not to be so construed as to exclude the power to make such contracts as that sued on. They were designed merely to enlarge the powers of the corporation, and to point out the agents by whom such formal contracts as might be made by the formal acts or resolution of the board of directors might be completed. They were not designed to repeal or annul the provisions of the General Statutes of the State which hold corporations bound on implied contracts as well as their more formal contracts. (19 How. 318.)

Glover & Shepley, and *Sharp & Broadhead*, for respondent.

I. There can be no such thing as an oral insurance in any case. There will be cases cited to support such a view, but upon examination they will be found to be either (*a*) cases of a written contract and parol waiver of conditions, such as the case of *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; (*b*) or cases enforcing a parol agreement to make a written contract; in this class

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comes 19 How. 318, which was a bill in equity to enforce a parol agreement to insure (2 Dutch. 268); (c) or cases of a parol contract to renew a written policy for a further period. In this class comes the First Baptist Church v. Brooklyn Ins. Co., 19 N. Y. 305, which was a case where there had been a policy taken out for a year, and by agreement it was to continue on at the same premium till either party notified the other, and on the faith of it a number of premiums had been paid. Both sound reason and authority are on the side that an oral insurance is a thing unknown to the law. (1 Duer on Ins. 60, § 5; 16 Ohio, 148; 6 Duer, 6; 9 Lower Canada, 488; 2 Cranch, 168; Plahto v. Merch. & Manuf. Ins. Co., 38 Mo. 252; Mound City Ins. Co. v. Curran, 42 Mo. 374.)

II. But if it be admitted that in some cases oral insurance is valid, yet in the case of this company the charter and by-laws of the company prohibit any oral insurance.

WAGNER, Judge, delivered the opinion of the court.

An exceedingly wide range was taken by the counsel in the argument of this case, but upon an examination of the pleadings as embodied in the record, the decision must be confined within much narrower limits. The amended petition on which the case was tried alleges that the plaintiffs were partners, and that on the 25th of March, 1864, they made with defendant a contract and agreement by which the defendant agreed that any shipment of cotton made by Butler & Co., of which firm plaintiffs were members, on any steamboat from any point on the Mississippi river and its tributaries to any point on said river, and consigned to either Butler & Co. or the plaintiffs, might be at the time of shipment entered on the bill of lading as insured by the defendant.

The petition then avers that on the 9th day of June, 1864, the cotton on which the loss is claimed was shipped on the steamer Progress, consigned to Butler & Co. at Cairo; that immediately upon the signing of the bills of lading for the cotton on board the steamer, a memorandum was entered on said bills, which stated that the same was insured in Henning & Woodruff's open policy of insurance with the United States Insurance Company.

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There is, then, an averment of loss by fire, one of the perils insured against, an offer to pay the premium, and a demand for the insurance money and a refusal to pay.

The answer of the defendant denies that any contract was made as stated in the petition, and substantially negatives every material allegation stated therein.

The plaintiffs, to maintain the issue on their side, offered in evidence an open policy issued by the defendant to them in the year 1855, which policy was in many essential particulars different from the contract on which they sought to recover. But, to avoid the variance and bring the contract within the operation of the policy, it was sought to introduce parol proof to show that the written policy was altered and modified by the consent and agreement of the parties, and that both parties subsequently acted upon the verbal modification.

This evidence was all excluded by the court, and the plaintiffs took a nonsuit, and after unsuccessfully seeking to set the same aside, they appealed to this court. There is no doubt in my mind that the intention of the parties, as declared by the words of the instrument, must govern, and subsequent acts and declarations may be looked to in aid of the construction. Parties may by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. This proposition is well supported by authority. (*Bunce v. Beck*, 43 Mo. 266; *Cummings v. Arnold*, 3 Metc. 486, where the cases are collated and referred to.)

But in the present case the written contract is not declared on, nor is the suit instituted upon it in any modified form. The petition sets forth an absolute, independent agreement disconnected with any other previous transaction, and such being the case, it was not competent for the plaintiffs at the trial to blend the two and graft the verbal on the prior written contract. We therefore see no error in the action of the court in excluding the evidence. The only remaining question, then, to be considered in the case is whether the verbal contract of insurance alleged to have been made in March, 1864, can be held valid. There is much disagreement in the books as to the power of corporations

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to make contracts of insurance by parol. At common law there is nothing absolutely requiring that the contract should be in writing, though a written instrument is undoubtedly usual and customary. —

In a recent case in this court (*Plahto v. Merch. & Manuf. Ins. Co. of St. Louis*, 38 Mo. 254) the learned judge who then occupied a seat on this bench said: "It would seem to be a settled principle that a policy of insurance must be in writing," and to sustain him in this proposition he cites 1 Arn. Ins. 50, note 1; 1 Duer on Ins. 60; 1 Phillips on Ins. 8; 3 Kent's Com., 7th ed., 921, note *c*. And Judge Read, speaking for the court in Ohio, declared that it was the universal commercial usage, confirmed by the general tenor of the authorities, that the contract should be in writing, and that it had been decided that such a thing as a verbal policy of insurance was unknown to the law. (*Cockerel v. Cincinnati Ins. Co.*, 16 Ohio, 148; see also *Mound City Ins. Co. v. Curran*, 42 Mo. 374.) But the principle in the foregoing cases is, I think, too broadly stated. Corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. The business of insurance is not strictly a corporate franchise; any person may engage in it unless forbidden by law; and where a private person engages in it, his parol contracts will bind him in the same manner as in any other business. The counsel for the appellants have cited a number of cases to show that verbal contracts of insurance are valid and will be upheld. Upon inspection it will be seen that they are adjudications arising at common law, where no particular mode was pointed out in the organic act chartering the company, or that they depend on special circumstances.

In the case of *Mobile Marine Dock & Mutual Ins. Co. v. McMillan*, 31 Ala. 711, it was said that, conceding that many commercial codes expressly require the contract of insurance to be in writing, it was certain that the common law made no such requisition, and it was held that there was no statutory provision in force in Alabama which required an agreement entered into in

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that State to insure against loss by fire to be reduced to writing; therefore, in the absence of any such statutory provision, the question whether such an agreement was valid should be determined by the common law, and that law did not require it to be in writing.

Kennebec Co. v. Augusta Insurance & Banking Co., 6 Gray, 204, was an action against a foreign insurance company, and two questions were raised by the record: first, whether the agents had authority to bind the corporation; second, whether the facts proved made a valid insurance.

It was an open policy of insurance "on property on board vessel or vessels to, at and from all ports and places, as per indorsements to be made hereon," provided that it should not be binding until countersigned by the agents of the company at Boston, and it was so countersigned. The agents afterward agreed orally with the assured to insure under this policy, for an additional premium, a certain number of bales of cotton on shore at New Orleans. The court decided that, in the absence of evidence of any limitation of the agents' authority, they were competent to bind the company; and having entered the risk upon the books of the company as taken, it was equivalent to a policy.

The Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co., 19 How. 318, was a suit in equity to compel the specific performance of a contract to make re-insurance of a ship. The application for re-insurance and the assent by the officers of the company were clearly proved, and the court held that the agreement to issue the policy was binding, and specific performance was decreed.

In *The Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, there was a fire policy issued for one year, and there was a subsequent agreement between the parties that until notice by either party to the other, the policy should be renewed from year to year. This it was held was not within the statute of frauds, and might properly be made by parol.

In the conclusion to which we have arrived, it is not necessary to impugn the doctrine of the above cases in the least. Did the record present a case so as to make them applicable, we should

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be strongly inclined to follow them, but we find here nothing but a naked verbal agreement, alleged to have been made in March, 1864, sued upon. This is denied, and there is no proof of it; but were there evidence to sustain it, it could not be upheld. It is the universal and well-recognized rule that a corporate body can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of law, and derives all its powers from the act of incorporation.

In the third section of the act incorporating the defendant we find it declares that "all the conditions of policies issued by said company shall be printed or written on the face thereof." Authority is then given to make by-laws, and one of the by-laws requires that the president "shall sign all policies or other contracts by which the company are bound." Again, another rule provides that "every proposal for insurance shall be by written application, signed by the applicant or his agents." These provisions are satisfactory and conclusive to my mind that there could be no original and binding contract by parol.

The result is that the judgment of the Circuit Court, with the concurrence of the other judges, must be affirmed.

On motion for rehearing, WAGNER, Judge, delivered the following opinion:

The counsel for the appellants have moved this court to grant them a rehearing in this cause; but, upon a re-examination of the subject and a review of the opinion, we have seen no reason for departing from our former views. The charter and by-laws of the company, in our opinion, required absolutely that the policy should be in writing, and this suit was instituted upon a simple verbal agreement—not on the original policy—nor was any modification of it alleged. The case of *The Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, so strongly urged and confidently relied upon, has no controlling application to this case. That was a suit in equity to compel the specific performance of a contract to make re-insurance on a ship. It was objected that by force of a statute in Massachusetts insurance corporations could make valid policies of insurance only

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by having them signed by the president and countersigned by the secretary. But the court said that they were of the opinion that that statute only directed the formal mode of signing policies, and had no application to agreements to make insurance. That case and the one we are now considering are totally dissimilar. The statute allowing amendments to be made in furtherance of justice, so as to make the pleadings conform to the proof, upon the most favorable construction can not be tortured so as to include the amended petition which was sought to be filed in this case. In every view in which we can regard the matter, the motion must be overruled.

ASHLEY K. NORTHRUP *et al.*, Appellants, v. THE MISSISSIPPI VALLEY INSURANCE COMPANY, Respondent.

1. *Insurance companies, fire—Indorsements by secretary and president, effect of.*—The acting secretary of an insurance company indorsed on a policy issued on certain property which had been sold to A. prior to the expiration of the policy, "Loss, if any, payable to A." The president further indorsed: "This policy is hereby changed to cover chairs and benches, instead of the museum collection, which is removed." *Held*, that the indorsements constituted valid contracts of insurance, and that the company was liable thereon.
2. *Insurance companies, fire—Admissions by officers, effect of.*—A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.
3. *Insurance, fire—Declarations of president—Res gestæ.*—In suit on a fire insurance policy the declaration of the president, at a time when claims for the losses were presented to him for settlement, that he would pay if other companies would, was evidence against the company as a part of the *res gestæ*.
4. *Practice, civil—Pleadings—Answer—New matter must be set forth in pleadings.*—Under the old system of pleading the general issue, everything was open to proof which went to show a valid defense; but under the present practice act (Wagn. Stat. 1015, § 12), if defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language; otherwise he will be precluded from giving evidence of it at the trial.

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Appeal from St. Louis Circuit Court.

Sharp & Broadhead, and J. F. Smith, for appellants.

Cline, Jamison & Day, for respondent, among other points, contended that the indorsement on the policy, "Loss, if any, payable to Northrup," etc., by the clerk of defendant, did not amount to a renewal of the policy to plaintiffs. The clerk had no power to make a new policy, and could not make a substitution amounting to a renewal. (42 Mo. 374.) There was error in the action at Special Term, and the reversal by General Term was proper.

WAGNER, Judge, delivered the opinion of the court.

The material facts in this case appear to be these: In the month of October, 1866, respondent issued two policies of insurance to the St. Louis Museum, Opera and Fine Art Gallery Association: one for \$2,500 upon the "theatre part" of the building known as the St. Louis Museum and Opera House, the other for the same amount "on museum collections contained in museum part" of the building. The rate of premium charged and paid on each of the policies was three per cent., and on each was the written entry made at the time of issuing the policy, "notice of other insurance waived until required." By the terms of the policies the respondent insured the property for one year against loss or damage by fire. The policies contained nothing in regard to the manner or form in which the companies could make contracts of insurance, nor by what officers they should be made; nor was there anything said in them in regard to applications for insurance on property within the limits of the city of St. Louis, though a printed clause provided that "applications for insurance on property out of the city should be in writing."

There were no conditions or provisions regarding the sale of the property insured, but there were two printed clauses in reference to an assignment of the policies as follows: "The interest of the insured in this policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer or termination of the interest of the insured, either by

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sale or otherwise, without such consent, this policy shall from henceforth be void and of no effect." Also, "the interest of the insured in this policy is not assignable unless the assignee, before any loss happens, shall give notice in writing of the assignment to this company, in order to have the same indorsed on or annexed to this policy; and this company, when so notified, may elect either to continue the insurance, and express the same by indorsement on this policy, or refund a ratable proportion of the premium for the time of the risk unexpired, and cancel the policy."

In March, 1867, before the expiration of the policies, the property insured was sold under a deed of trust, and at the sale R. F. Lamb and the appellants purchased the same. Lamb, who was president of the association, and in whose possession the policies were, took them to one Brawner, an insurance broker, told him of the sale to himself and appellants, and instructed him to get the property insured to them as the owners. Brawner gave the respondent written and verbal notice of these facts, and applied to it for insurance to Lamb and appellants on the property. He sent the written notices, together with the policies, to respondent's office by his book-keeper, and after a day or two had elapsed respondent returned the policies to Brawner with the written entry on the face of each one, "Loss, if any, payable to R. F. Lamb, A. K. Northrup and A. Boeckler." Brawner then gave the policies to Northrup. About two weeks after Brawner had delivered the policies to Northrup with these written entries on them, the museum collection was sold, and the policy on it was sent to respondent's office with a request that it might be changed to cover chairs, benches and furnaces, as the museum collection was removed from the building. The policy was handed to and the request made of Jennings, the president and managing officer of the company, who then made this additional entry in writing on the face of the policy:

"This policy is hereby changed to cover chairs, benches and furnaces, instead of museum collection, which is removed.

WM. H. JENNINGS, President."

In July, 1867, the building and the chairs, benches and furnaces were totally destroyed by fire. Notice of loss was immediately

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given to respondent and proof of loss furnished. Jennings, the president, in conversation with Lamb and Northrup, told them that the entry, "Loss, if any, payable," etc., "was all right;" if other companies paid, he would. It seems it was then supposed that the building was set on fire, and resistance to payment was intended on that ground, but no objection was made to the policy or the indorsements. After the loss occurred, Lamb assigned all his interest in the claim for the loss to the appellants. Respondent failing to pay, the appellants brought this suit, setting out the terms and conditions of the policies and the indorsements thereon, with an averment that the appellants complied with all the conditions of the policies and furnished notice and proof of loss.

The answer of the respondent admits that it issued the policies to the St. Louis Museum, Opera House and Fine Art Gallery Association, as charged in the petition, but denies that it had notice of any assignment of the property to appellants and Lamb, and denies that it ever agreed to insure appellants and said Lamb upon the same terms and conditions of said policy as charged in said petition, or that it ever received any application from appellants for any such insurance, or any consideration or premium therefor, or that it agreed for the unearned premium to insure appellants and said Lamb. It further denied that it agreed, in writing, to pay the loss, if any, to Lamb and appellants, but alleged that the policy became void before any loss occurred, by reason of the sale and transfer of the interest of the Museum Association without the knowledge or consent of the respondent manifested in writing, as required by the terms of the policies, and that by reason thereof the same was void and not binding. After pleading to the counts of the petition, the answer made a general averment that, when the risk was taken and the policies issued, the museum was conducted in a quiet and orderly manner, so as to make it a safe risk, and afterward it was occupied in such a way as to make it more hazardous, and that in consequence thereof the policies became void.

The answer does not deny the power and authority of the person who made the entry on the policies, "Loss, if any, payable to R. F. Lamb, A. K. Northrup and A. Boeckler," to bind respondent

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in any manner or by any contract he might choose to make. The indorsements or entries were made by Cornish, who was the secretary *pro tem.* in charge of the office, and afterward expressly approved by Jennings, the president. There was no charter or by-law pleaded showing any restraint or prescribed condition for making or indorsing policies, nor was there anything set up to show an excess of authority on the part of the officers.

Upon the case as thus substantially made, the Circuit Court, at Special Term, found for the appellants. This judgment was reversed in General Term, and an appeal was taken. The question now is, under these circumstances can the respondents be held liable?

In the absence of any explicit prohibitions from making parol contracts contained in the charter and by-laws, corporations, like natural persons, may make parol contracts. Indeed, by the whole course of decisions in this country, corporations, in their contracts, are placed upon the same footing with natural persons, open to the same implication, and receiving the benefit of the same presumptions. (Ang. & Ames on Corp., § 240.)

In the case of Henning & Woodruff v. The United States Ins. Co., *ante*, p. 425, we held that "corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business, which a natural person may adopt in the exercise of similar powers. The business of insurance is not strictly a corporate franchise; any person may engage in it unless forbidden by law; and where a private person engages in it, his parol contracts will bind him the same as in any other business."

Cornish, the clerk and acting secretary, was in charge of the office and acting for the company, and when the policies were returned with the entries written thereon, "Loss, if any, payable to Lamb, Northrup and Boeckler," the parties had a right to presume that it was done by rightful authority. Jennings, the president, who it appears had full power to act, admitted that the contract was a valid one, before the loss, by making a further and additional entry on one of the policies, and, after the loss, by telling both Lamb and Northrup that the entry was all right,

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and if the other companies paid he would. In this case it is very clear to my mind on the state of the pleadings that the agents were acting within the scope of their general authority, and the company is responsible for their acts in the premises. (Horwitz v. Equitable Ins. Co., 40 Mo. 557; Combs v. Hannibal Savings & Ins. Co., 43 Mo. 148; Rowley v. Empire Ins. Co., 36 N. Y. 550.)

In Conover v. Mutual Ins. Co., 1 Comst. 290, it was decided that where a policy of insurance prohibited an assignment of the interest of the assured, unless by the consent of the company manifested in writing, and the secretary, on an application to him at the office of the company, indorsed upon the policy and subscribed a consent, his authority to do so, in the absence of evidence to the contrary, was to be presumed. The court in their opinion say: "Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ not only know what their powers and duties are, but that they do not habitually and as a part of their system of business transcend those powers. How else are third persons to deal with them with any degree of safety? They can have no access to the by-laws and resolutions of the board, and no means of judging in the particular instance whether the officer is or is not within the prescribed limits."

In Salomes v. The Rutgers Fire Ins. Co., 3 Keyes, 416, the facts were as follows: Charlotte Quisse owned a house and some furniture, occupied and used by her, in Westchester county, upon which she desired insurance for \$4,000. She employed her husband to obtain such insurance, and gave him fifty dollars to pay the premium. The husband went to New York and made application to the Stuyvesant Company for the whole amount of the insurance, informing the company that it was to be insured for Charlotte Quisse, who owned the property. The company agreed to make the insurance, and received of him fifty dollars for the premium. The Stuyvesant Company, not wishing to assume the whole risk, applied to the defendant, who agreed to insure \$2,100 of the amount. About a week afterward, A. H. Quisse, the

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husband, called again, and the Stuyvesant Company gave him two policies upon the property—one for \$2,100, executed by the defendant, and one for \$1,900, executed by itself—both insuring A. H. Quisse, the husband, instead of Charlotte, the wife. A. H. Quisse did not learn this, but spoke about there being two policies when he expected but one, but was assured that defendant's company was good, and that it was all right, and he took the policies. The mistake in the policies remained undiscovered by Charlotte and A. H. until Charlotte was called upon for additional security for two mortgages given by her, when she took both policies to the attorney of the mortgagees, who at once discovered the error, knowing that the title was in Charlotte, and informed her thereof, at which time she employed him to procure them to be corrected, and authorized him to have, in addition, the losses made payable to the respective mortgagees, the policy in question to Mary Entwistle. The attorney gave the policies to a clerk, to go to the officers and get them arranged in accordance with the wishes of Mrs. Quisse. The clerk proceeded with the policy in question to the defendant's office, and presented the same to defendant's secretary, and informed him that the property in question belonged to Charlotte Quisse, and that she wanted the loss, if any, made payable to Mrs. Mary Entwistle. The secretary indorsed on the policy the loss payable as requested, and returned the policy to the clerk, who received it, supposing it all right. The secretary made no verbal reply to the request of the clerk, and did nothing except as above stated. The property insured was afterward, and during the life of the policy, destroyed by fire; and Charlotte Quisse and Mary Entwistle each assigned their claim to plaintiff, who prosecuted the defendant for the amount insured. Upon these facts the court held that the indorsement of the secretary was a valid contract with Charlotte Quisse, under which the company was liable for loss of the premises by fire.

Grover, J., declared: "It is well settled that an agreement by parol to insure and to make out a policy, where the terms are all understood, is binding upon the insurer, and will be enforced in the courts. In this case I think this agreement of the secretary was a valid contract, binding upon the company."

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And Hunt, J., said: "What was the intention, and what was the legal effect of this return of the policy with a consent indorsed that the loss should be paid to Mary Entwistle? The intent could honestly be no other than to re-deliver the policy after this information, and insure anew the property described. If the defendants can be supposed to have reasoned with themselves thus: "Here is an error; we will say nothing about it, we will keep the premium, and avoid a liability if a loss should occur," then the well-settled principles of law and morality would compel the indemnity to the party claiming. The defendants will be compelled to perform the contract as they allowed the other party to understand it and to suppose that they understood it. I doubt not that the intention of the defendants in returning the policy to Mrs. Quisse's agent uncorrected, after being advised of the error, was to re-issue and re-deliver the same, disregarding the error, and such was its legal effect."

So the court in Maryland, speaking on the same question, said that the effect of indorsing the memorandum of insurance on a policy was in effect to make a new contract, subject to the terms and stipulations contained in the policy, except so far as they were varied by the terms of the indorsement. (Com. Ins. Co. v. Cropper, 21 Md. 311.)

The act of the defendants here amounted to an engagement on their part that they would retain the unearned premium and regard the policy as valid, and pay the loss, if any, to the parties designated. It is certain that Lamb, Northrup and Boeckler so understood it, and relied, in consequence thereof, upon the confident belief that they were fully insured. This belief was directly superinduced by the act of the defendant, and to hold now that the contract was ineffective and not obligatory, would be ruling in favor of trickery and deception.

As before indicated in a prior part of this opinion, a corporation acts through its officers; and the admissions of such officers, made in the execution of the duties imposed upon them, and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation. Cornish, as

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secretary *pro tem.*, had the unquestioned authority, as was his habit, to make indorsements on policies. Whether he made them in exact or precise accordance with the rules of the company was not for the insured to inquire.

Mr. Jennings had full and ample power to make contracts and to settle and adjust claims and bind the corporation, and when the matter was presented to him for settlement he was acting in the business of the corporation and within the scope and bounds of his power; and what, therefore, he said in reference to the indorsement's being all right was said in reference to the subject-matter of the business before him, and is evidence against the corporation as part of the *res gestæ*. I therefore entertain no doubt about the indorsements constituting valid contracts of insurance, and that the corporation is liable thereon.

An attempt was made to show that the premises were so used that the risk was increased, and that the policy was thereby vitiated. But the questions asked of the witness were improper, and the evidence rightfully excluded. The questions tended to elicit no facts. They did not concern science and skill, and furnished no basis for an examination as an expert. Whether the property was used in such a way as to render it more hazardous was a question for the determination of the jury, and not a matter resting in the opinion of the witness.

Some other points are now urged, but it is sufficient to say that they were not set up in the answer, and are utterly outside of any issue raised by the pleadings.

The statute provides that the answer of the defendant shall contain: first, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition. (2 Wagn. Stat. 1015, § 12.)

Where new matter is relied upon in defense or in evidence, it must be set out in the answer. Therefore the grounds taken in reference to a stamp and the keeping of a bar in the premises, are not open as a defense to the defendants, inasmuch as they

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were not set forth in their answer. X Under the old system, by pleading the general issue everything was open to proof which went to show a valid defense. But the practice act, which has substituted for the general issue an answer, and requires a statement of any new matter constituting a defense, in addition to a special denial of the material allegations of the petition intended to be controverted, has worked a complete and total change in the principles of pleading. The defendant, by merely answering the allegation in the plaintiff's petition, can try only such questions of fact as are necessary to sustain the plaintiff's case. If he intends to rely upon new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on. It follows that whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial. X As the matters alluded to and pressed in the argument were not presented in the answer, and no issue was tendered or joined upon them, they can not be now raised in this court. The result is that the judgment at General Term must be reversed and that at Special Term affirmed. The other judges concur.

THE STATE OF MISSOURI, Respondent, v. CHARLES VASEL,
Appellant.

1. State v. Vasel, *ante*, p. 416, affirmed.

Appeal from St. Louis Court of Criminal Correction.

A. J. Baker and R. S. Macdonald, for respondent.

Fisher & Rowell, and *Slayback & Haeussler*, for appellant.

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding under the statute for extortion. The case is not distinguishable in principle from that of State v.

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Vasel, *ante*, p. 416. There was testimony tending to prove the material allegations of the complaint, which well warranted the result reached by the court. No instructions were asked or given on either side.

The objections to the complaint sought to be raised by the motion in arrest, if of force at all, are not available under that motion, and the judgment will be affirmed. The other judges concur.

THE UNION SAVINGS ASSOCIATION, Respondent, v. JOHN J. EDWARDS *et al.*, Appellants.

1. *Practice, civil — Jury, special — Impaneling of, may be ordered, when.*— A court may, in its discretion, order a special panel to try a cause, and such order is no ground of objection unless it appear that the party objecting was prejudiced or injured by the action of the court.
2. *Evidence — Admissions of principal, in suit against principal and sureties.*— Admissions made by a defaulting bank teller to the president, when the default was first discovered, were competent evidence against him and his sureties, because they formed a part of the *res gestæ*, and were made by him while acting in the course of his official duty. But it would not be in his power afterward to make admissions to the detriment of his sureties. Where, however, suit was against himself and his sureties combined, such admissions would be evidence against himself, and the court should be asked to instruct the jury that such evidence should be disregarded so far as the sureties were concerned.

Appeal from St. Louis Circuit Court.

Hudgens & Son, Peacock & Cornwell, and Cline, Jamison & Day, and Lackland, and S. Knox, for appellants.

I. The appellants insist that the court erred in admitting the testimony of Charles Bell against the sureties of Edwards. The imaginary conversation to which he referred took place several weeks after Edwards had been discharged by the plaintiff. (1 Greenl. Ev., § 187.)

II. The sureties were discharged from liability on the bond for the reason that the plaintiff required of Edwards the discharge of other duties than those of teller, by reason of which the risk of

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Edwards' sureties was greatly increased. (Morse on Banking, 207; Grant on Banks and Banking, 265-6; 11 Mo. 447; 21 Mo. 51.)

III. The by-laws, by which the duties of the officers of the bank were defined and prescribed, were clearly admissible in evidence.

IV. The custom of paying overdrafts had been so common as to prevent the plaintiff from recovery of Edwards' sureties for money paid in good faith on overdrafts.

V. The court erred in causing a venire to issue for a jury of bankers, merchants and manufacturers, against the objection of defendants.

T. T. Gantt, with whom were *Bakewell & Farish*, for respondent.

1. The court below was well warranted in ordering a special jury in this case. (Gen. Stat. 1865, ch. 146, p. 599, § 23.)
2. The testimony of Charles Bell was properly admitted against Edwards. If any other defendant wished the court to limit its application, he should have asked an instruction to that effect.
3. The record of the trial of the indictment against Edwards in the Criminal Court was properly excluded, being totally irrelevant.
4. The by-laws of the plaintiff were properly excluded. They do not attempt to define the duties of teller, and at best they are merely rules for the internal management of the affairs of the Union Savings Association; they constitute no contract between the bank and the external world.
5. The instructions given contain a correct exposition of the law applicable to this case.
6. The instructions refused were either inapplicable to the case at bar or contained erroneous declarations of law.
7. There was no refusal to permit the defendants to amend their answer.
8. There is no foundation in the record for the suggestion that the jurors were biased.
9. It was competent for the court to give the judgment shown by the record for the penalty of the bond and interest from the commencement of the action, restricting execution to the sum awarded by the jury and costs.

WAGNER, Judge, delivered the opinion of the court.

The respondent brought its action against the appellants for a breach of an official bond. The case shows in substance that on the 30th of June, 1866, Edwards being appointed teller of the Union Savings Association executed a bond for the faithful performance of his duties in that capacity. The penalty of the bond was for \$15,000, and was signed by him as principal and the other defendants as sureties. The bond recited that Edwards had been appointed teller of the institution, and would have duties to perform as such, and would receive into his possession and have under his control money, property and effects of the institution, and was conditioned that he should execute said duties with integrity and fidelity, and well and faithfully perform and fulfill the trust in him reposed, and account for and render over, upon request, all money and property that might come into his hands, so that no default, fraud or failure should happen or be occasioned by neglect or failure on his part to perform his duties as teller. Edwards continued to act as teller until March 6, 1867, when he was discharged. On the 25th of February, 1867, he paid to Brentano \$17,352.14 of money belonging to the respondent in excess of all that Brentano was authorized to check for. He concealed this payment until the 27th day of February, 1867, when, being notified that the committee would count cash on that day, he endeavored to have the counting postponed, and failing in this, he acknowledged the use that he made of the money. Subsequently Brentano paid \$3,000 of the amount, and the remainder is still wholly unpaid.

The answer set up by way of defense that Brentano was a good customer of the association; that overdrafts were habitually allowed to customers; that Edwards had authority to allow them; that he had been appointed secretary *pro tem.* of the association, and in this capacity had an enlarged discretion to allow overdrafts; that the payment by him to Brentano had been made in good faith, in pursuance of the authority vested in him, and in the regular course of business. To this defense there was a replication denying that overdrafts were allowed by the association,

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or that Edwards had any authority whatever to permit the same; denying that he had paid this money to Brentano in good faith, and setting up that it was in violation of express warning and prohibition as to Brentano. Jennings, one of the sureties, set up as an additional defense that he was induced to sign the bond as surety by fraudulent misrepresentations made to him by the plaintiff as to the nature of the risk he would run by so doing. A replication was also filed to this answer. The court ordered a special jury, and the verdict was for the plaintiff.

It is not our purpose to review the evidence or comment upon it, as the jury were the exclusive judges to determine its weight and value. It may be said, however, that the evidence shows most conclusively that Edwards, in paying the overdrafts to Brentano, acted in the capacity of teller, and in that capacity only. An objection is raised that the court erred in impaneling a special jury to try the case. But the statute expressly provides that all courts of record in which juries are required shall have the power to order a special jury for the trial of any civil cause, and, when ordered, the sheriff shall summon them according to the order of the court. (1 Wagn. Stat. 800, § 23.) The special panel may be ordered in the discretion of the court, and there is nothing disclosed here tending to show that the discretion was unwisely exercised. The mere objection is not sufficient; there must be something to show that the party was prejudiced or injured by the action of the court.

It is also assigned for error that the court improperly admitted the evidence of one Bell against the objections and exceptions of defendants. Bell testified that he met Edwards in the last part of March, and wished to see if he could or would secure the bank against his defalcations. Edwards said he thought he could. Witness asked him how he came to get into this trouble. He said it was through speculation; that he and Brentano had been speculating in gold and stocks. On cross-examination he testified that Edwards said he allowed Brentano to overdraw his account to pay up margins on gold operations, and that he had an interest in them; that they had bought gold bonds and stocks on joint account, and had lost money on them; that Brentano had lost

money in gold speculations, and there was where the money went to. This evidence was objected to as incompetent against the sureties. The court overruled the objection, and declared that if it was admissible for any purpose the court could not exclude it. Had the suit been against the sureties alone, the evidence would have been clearly inadmissible. It is not within the power of the principal, after a transaction is past and gone, to make admissions to the detriment of his sureties. Greenleaf states the rule thus: "We are next to consider the admissions of a principal, as evidence in an action against the surety upon his collateral undertaking. In the cases on this subject the main inquiry has been whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become a part of the *res gestæ*. If so, they have been held admissible; otherwise not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct by original evidence where it can be had, excluding all declarations of the principal made subsequent to the act to which they relate, and out of the course of his official duty." (1 Greenl. Ev., § 187.) Therefore the admissions which Edwards made to Rutherford, the president of the bank, when the default was first discovered, were competent evidence against him and his sureties because they formed a part of the *res gestæ*, and were made while acting in the course of his official duty; but they would not be competent against the sureties after his official duties had ceased. But in the case at bar the action was against the principals and sureties combined. The evidence was certainly admissible against the principal, and the court should have been asked to instruct the jury that the evidence should be disregarded so far as the sureties were concerned. This was not done, and as the evidence was admissible for one purpose, the court was entirely justified in overruling the broad objection of the defendants.

The first instruction given for the plaintiff told the jury that "if they believed that Edwards, on or about the 25th of February, 1867 having charge and possession of the cash of the Union

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Savings Association as teller thereof, did pay to Henry Brentano, or to any other person or persons upon the checks of Brentano, the sums of money in the petition mentioned, making over and above all money then deposited by or standing to the credit of the said Brentano on the books of the said Union Savings Association the sum of \$17,352.14, and that of this sum only the sum of \$3,000 has since been paid, and that the said Edwards had, after the making of the said bond and before the 25th of February, 1867, been specially cautioned and warned by the president or directors of said Union Savings Association not to allow the said Brentano any indulgence, then the said Edwards is a defaulter to the Union Savings Association in the sum of \$14,352.14; and the jury so finding, will give a verdict against the defendants in the said sum of money, with six per cent. interest from the commencement of this action."

The second instruction told the jury that "though they might believe from the evidence that Edwards occasionally permitted some of the customers and depositors of the Union Savings Association to make overdrafts without apprising the president or obtaining his sanction therefor, yet if they believed that such conduct on the part of said Edwards was contrary to the general instructions given to him as teller in respect of all the customers of said association, and that in the case of said Brentano himself, the said Edwards had, within two months or thereabouts, been specifically cautioned and warned by the president or directors of said association not to permit any such overdrafts by said Brentano, then the defendants could not avail themselves of any such previous allowance of overdrafts by the said Edwards as a warrant for his permitting or making the payment of the money in the petition mentioned to the said Brentano or to the holder of his checks; and such previous allowance constituted no defense to the action."

The third instruction told the jury that there was no evidence before them of any such representations on the part of the plaintiff to the sureties of Edwards to induce them to become sureties as to constitute any defense to the action. This instruction was undoubtedly correct. The evidence wholly fails to sustain the

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allegations in the answer, that the signing as sureties was superinduced by the representations and conduct of plaintiff.

The court, at the request of the defendants, gave five several instructions:

"1. If the jury believe from the evidence that J. J. Edwards, with the knowledge of the plaintiff, its president and directors, was in the habit of paying overdrafts made by the depositors of the plaintiff; that in the matter of the overdrafts in question, said Edwards acted in good faith, in accordance with his best judgment, in the payment of said overdrafts, then plaintiff can not recover in this action unless it satisfies the jury by evidence that Edwards was prohibited from paying said Brentano's overdraft.

"2. Neither of the defendants in this suit are liable for any damage the plaintiff may have sustained by any act of said Edwards, which, by the common usage of the plaintiff, said Edwards was authorized to perform, unless such act was unlawful or such an act as shall prove to the satisfaction of the jury a want of integrity or fidelity on the part of the said Edwards.

"3. If the jury believe from the evidence that the defendant Edwards, as an officer of plaintiff, paid the checks of Brentano in the usual course of the business of plaintiff, and in a reasonable exercise of the authority and directions given him by the plaintiff in the discharge of his duties, without intending any fraud or injury to plaintiff, then plaintiff can not recover in this action.

"4. Neither of the defendants in this suit are liable except it be from some want of fidelity or integrity as teller of the plaintiff, by reason of which plaintiff sustained damages; or unless the plaintiff shall satisfy the jury by evidence that said Edwards failed well and faithfully to perform and fulfill the trust reposed in him as teller of the plaintiff; or unless the plaintiff shall satisfy the jury by evidence that said Edwards, when thereto required, failed to account for and render over all moneys, credits and effects that came to his possession as teller; or unless the plaintiff shall so satisfy the jury by evidence that some default, fraud or failure happened or was occasioned by neglect or omission on the part of said Edwards to perform his duties as teller.

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"5. If the jury believe from the evidence that plaintiff had, for a long time previous to the defalcation charged in plaintiff's petition, authorized defendant Edwards, as an officer of plaintiff, to permit customers and depositors to overdraw their deposits, either by direct authority or sanctioning or approving such overdrafts, and that the defalcation charged was an ordinary overdraft by a customer of said association, in accordance with the custom established by plaintiff and within the discretion confided to said Edwards, then plaintiff can not recover in this action."

The declarations of law are so manifestly just, and present the whole case with such unquestionable fairness, that it is impossible to find any ground of complaint. Acting under the instructions the jury must have found that Edwards, in paying the overdraft, acted in violation of his duties and contrary to the express instructions of his superiors; that there was no custom authorizing his conduct, and that the default was occasioned by his neglect of duty and failure to comply with the conditions of his undertaking. The jury were the sole and appropriate judges of what the evidence proved, and, in the absence of any erroneous instructions as to the law by the court, their verdict must be regarded as final. Were we permitted to weigh the evidence, we should have no hesitation in coming to the same conclusion.

The court committed no error in refusing the additional instructions asked by the defendants. The whole case was completely covered by the instructions already given; besides, some of them were wholly unwarranted by the evidence in the cause.

In viewing the whole record we have not been able to find anything objectionable, and are clearly of the opinion that the judgment should be affirmed.

Affirmed; the other judges concurring.

A motion for rehearing was filed in this case and overruled.

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GEORGE R. BAKER, TRUSTEE, ETC., Appellant, v. JAMES P. YOUNG, Respondent.

1. Insurance—Married women, act touching—Insurance for benefit of—Right of wife to alienate such insurance.—Under the law touching insurance for the benefit of married women (Wagn. Stat. 938, § 18), the wife has power to retain and appropriate insurance procured by her husband for her benefit if she sees fit, discharged from all claims of either her husband or his creditors. But it was not the intention of the Legislature in this act to impose on her any disability or restraint from alienation, where her act was free and voluntary.

Appeal from St. Louis Circuit Court.

Kinealy, for appellant.

The assignment is void because Ellen Baker and George Baker could not execute a valid assignment of Ellen Baker's interest in said policy before the court, under any circumstance, by reason of her coverture. (*Eadie v. Slimmon*, 26 N. Y. 9; *Laws of N. Y.* 1840, p. 59; *Wood v. Simmons*, 20 Mo. 363; *Jackson v. Purdew*, 1 Russell, ch. 1; *Honner v. Morton*, 3 Russell, ch. 65; *Hill on Trust*. 417, and cases cited.)

On general principles of equity, such an assignment is void as against the children of Ellen Baker. In the case at bar the trustee held the legal title to the policy. Mrs. Baker's estate and interest in the policy was purely an equitable one, and the trustee did not join in the assignment. Courts of equity will not permit a wife to assign her equitable interests, even to or with the assent of her husband, or for a valuable consideration, so as to bar her children. (*Fenner v. Taylor*, 1 Simons, 169; *Ex parte Gardner*, 2 Ves. Sr. 672.)

Rankin & Hayden, for respondent.

If it be assumed that the wife held the property as her separate estate, the plaintiffs can not recover, because the wife in such case has as full power of disposition as if she were a *femme sole*, and may dispose of her property so held either to her husband or any one else. (*Heatley v. Thomas*, 15 Ves. Jr. 596; *Bullpin v. Clarke*, 17 Ves. Jr. 365; *N. A. Coal Co. v. Dyett*, 7 Paige, 9;

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Jacques v. M. E. Church, 17 Johns. 485; Cheever v. Wilson, 9 Wall. 119; Freeman v. Freeman, 9 Mo. 772.) The statute could have no retrospective effect. The property vested under the old constitution and laws then in existence, and could not be divested. The equity vested in the wife exclusively. But even if the statute invoked has any application, it is not susceptible of the construction the plaintiff contends for. Sections 15 and 18 of the act took effect together, and must be construed together. It was not the intent of the Legislature to create a vested legal estate in remainder in a policy of insurance. Does section 15 pretend to do any such thing? And how can the plaintiff's construction be adopted without holding that the fifteenth section has no effect on any policies taken out since the act became a law? The case in 26 N. Y. is not in point. The New York act expressly provides that the parties may so make their contract of insurance as to give the children an interest. The children are named in the policy. (Kerman v. Howard, 23 Wis. 108; see Charter Oak Life Ins. Co. v. Brant, *ante*, p. 419.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, George R. Baker, is the husband of Ellen P. Baker, and Henry W. and Kate are their minor children. He brings this suit as the trustee of his wife and the next friend of the children. It seems that the plaintiff procured an insurance on his life for the benefit of his wife, in the Mutual Life Insurance Company of New Jersey, for the sum of \$5,000, the premium being paid by himself; that subsequently, with the consent of the company, the husband and wife joined in an assignment of the policy to the defendant, Young, to secure an indebtedness of the husband. At the date of the assignment the policy was non-forfeitable.

Prior to the institution of this suit he was appointed by the Circuit Court trustee for his wife, and he now sues for the recovery of the policy in her behalf and that of her children, claiming that the assignment was void. The suit is based upon the theory that immediately upon the issuing of the policy the wife and children took a vested interest, and that the wife was

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incapable of impairing or parting with it by any act of hers in conjunction with her husband. The doctrine that an assignment by husband and wife of the wife's reversionary interest in a chattel will not defeat the wife's right of survivorship, has been insisted upon as governing this case. But it does not apply, for here the parties are all living. The case must be governed by the construction placed upon section 18 of the act in relation to married women (2 Wagn. Stat. 936, § 18). The fifteenth section of the act does not apply, for that relates exclusively to where the wife obtains insurance and pays the premium, and it provides expressly that in case she survives her husband the sum or net amount of the insurance shall be payable to her, and for her own use, free from the claims of the representatives of her husband or of any of his creditors. But the eighteenth section declares that any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives. The section further provides that a trustee may be appointed by the Circuit Court for the county in which such married woman resides, to hold and manage the interests of any married woman in any such policy or the proceeds thereof.

In the first place I do not think that the children are proper parties, or that they have any interest in the proceeding. The clause in this section, that the policy shall inure to the separate use and benefit of the wife and her children, applies simply to the manner of the descent and distribution. After the wife has received and reduced the money to possession, and she dies, it shall go to her children, and not to the husband's representatives. This interpretation is made the more apparent by the concluding paragraph of the section providing for the appointment of a trustee to manage the interests of the married woman in the

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policy and its proceeds. But nothing is said concerning the interest of the children.

In the case of *The Charter Oak Life Ins. Co. v. Brant*, *ante*, p. 419, we expressed our opinion in favor of the assignability of these policies, where such assignment did not conflict with the policy and spirit of the statute. We must now arrive at the intent of the Legislature in the enactment of the eighteenth section. It provides for the inurement of the insurance for the benefit of the wife and children, independently of the husband and his creditors. It gives it to the wife and allows her to keep and retain it, if she chooses to do so, without molestation. The creditors of the husband can not reach it and deprive her of it against her consent, nor can the husband intermeddle with it contrary to her will.

But there are no terms of restraint used, nor any provision against voluntary alienation on her part. In *Eadie v. Slimmon*, 26 N. Y. 9, the insurance was effected by the wife at her expense, and the court thought it would be a violation of the spirit of the statute to hold that she could sell or traffic with her policy as though it were realized personal property or ordinary security for money. The facts of that case, however, are unlike the present, and the decision can not be regarded as controlling authority.

Here there is no question of survivorship, and the point is whether, when the husband obtains a policy for the benefit of the wife, and pays the premium with his own money, there is any prohibition against an assignment of it by the husband and wife conjointly. Even assume that it is the sole and separate estate of the wife, if there is no statutory restraint it may be parted with or alienated. The wife can not be compelled to use it for any purpose, nor can third persons wrest it from her; but if she will make a voluntary disposition of it, I see nothing to prevent her exercising the power. It has long been a settled and established rule of law that the wife may mortgage or assign her separate property to secure the payment of her husband's debts, and if we admit the soundness of the appellant's argument there is nothing to forbid the application of the principle to the present

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case. It frequently happens that the character of assignability constitutes one of the most important elements in life insurance. By it parties holding policies are enabled to negotiate loans and obtain the use of money, where otherwise it would be dead or unavailing capital. These benefits are entitled to no slight consideration.

The law for the complete protection and security of the wife gives her the power to retain and appropriate the insurance, where it is procured by others for her benefit, if she sees fit, discharged from all claims of either her husband or his creditors; but I think it was not the intention of the Legislature to impose upon her any disability or restraint from alienation where her act is free and voluntary.

The Circuit Court found for the defendant, and I think its judgment should be affirmed. The other judges concur.

 ESROM O. PICKERING, Defendant in Error, v. THE MISSISSIPPI VALLEY NATIONAL TELEGRAPH COMPANY, Plaintiff in Error.

1. *Practice, civil — Pleading — Demurrer — Defendant answering over, abandons.*—Defendant, by answering upon the merits after demurrer overruled, virtually withdraws and abandons the demurrer, although he makes no formal withdrawal.
2. *Practice, civil — Motion in arrest — Misjoinder of causes of action in same count.*—A motion in arrest does not bring up any question in relation to the mingling in the same count of different causes of action. A motion in arrest is designed to test the sufficiency of a petition or the sufficiency of the several counts therein.
3. *Practice, civil — Pleading — Breaches of a contract treated as independent causes of action — Objection to, can not be raised by motion in arrest.*—Whatever objection there may be to the technical accuracy of setting out each breach of a contract as a separate and independent cause of action, such objection is not available in a motion in arrest of judgment.

Error to St. Louis Circuit Court.

C. H. Krum, for plaintiff in error.

I. The third and fourth counts of the petition do not state facts sufficient to constitute a cause of action. (Langford *et al.* v.

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Sanger *et al.*, 40 Mo. 160 ; House v. Lovell *et al.*, 45 Mo. 381.) The counts fail to allege performance on his part by the defendant in error of conditions by him to be performed. An averment signifies a positive statement of fact in opposition to argument or inference. (1 Chit. Pl., 8th Am. ed., § 321.) The defendant in error must have averred performance or an excuse for non-performance. (*Id.*, § 326.) Performance, or readiness to perform, is not to be inferred ; it must be averred. (Hatch v. Peel *et al.*, 23 Barb. 575 ; Smith v. Brown, 17 Barb. 431 ; Helen v. Wilson, 4 Mo. 41, 44 ; Carpenter v. Stevens, 12 Wend. 589.)

II. The first count of the petition contains two causes of action improperly united. (a) The defect is apparent on the record. No exception to the action of the lower court was necessary to save the point. (Bateson v. Clark *et al.*, 37 Mo. 31.) (b) Even if the court should hold that answering over waived the objection now complained of, yet an opportunity should be given the plaintiff in error to avail itself of the defect in the record. At the time the demurrer was filed it was the settled doctrine of this court that the objection that causes of action are improperly united in a petition is never waived and may be taken advantage of in arrest of judgment. (McCoy v. Yaeger, 34 Mo. 134 ; Clark v. Hann. & St. Jo. R.R., 36 Mo. 202 ; Meyer v. Field *et al.*, 37 Mo. 434 ; Hoagland v. Hann. & St. Jo. R.R., 39 Mo. 451 ; Peyton v. Rose, 41 Mo. 257.) (c) The objections urged against the first count, if tenable, are fatal to the last count.

III. The defendant in error has divided one cause of action into three parts and sued upon each part. The court has found in his favor specially upon each part. All damage resulting to the defendant in error from a failure on the part of the plaintiff in error to perform its contract, is an entirety. Such damage is to be recovered in one suit founded upon one cause of action. "The authorities all agree that where the demand is an entirety, although consisting of several items, if judgment be recovered for a part of it, the judgment is a bar to an action for the remainder." (Flaherty's Adm'r v. Taylor, 35 Mo. 447.) Now, having reference solely to the first, third and fourth separate causes of action sued upon by the defendant in error, it is clear that he can

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not have a finding in his favor under the first without such finding operating as a bar to any subsequent finding upon the second and third. (*Town of Marlborough v. Sisson*, 31 Conn. 332.) The findings and judgment under the first and third causes of action can not be maintained. Under each of these causes of action the defendant in error has a finding in his favor. So that if this judgment is to be sustained, a party to a contract can sue and recover not only the contract price, but may have specific damages for non-compliance by the other party, with certain conditions of such contract during performance.

Isaac T. Wise, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

The parties contracted together in writing as follows: The defendants agreed to furnish the poles and other material for a telegraph line from Keokuk, Iowa, to St. Louis, a distance of 214 miles. The poles were to be supplied at different points along the Mississippi river bank in the time and manner pointed out in the contract. The plaintiff agreed to distribute the poles from the points where they were to be left and to construct the telegraph line at \$40 a mile. Three of the counts in the petition are based upon alleged breaches of the contract on the part of the defendants. The breaches complained of are, in substance, (1) that the defendants neglected and refused to furnish the material for the last fifty-nine miles of the line, thereby breaking off the job and preventing its completion by the plaintiff; (2) that the defendants neglected to furnish the material for the 155 miles actually constructed by the plaintiff, in the time agreed on, whereby, it is claimed, the plaintiff was greatly damaged; and (3) that the defendants had failed to pay the stipulated price for the erection of the 155 miles as they had agreed to do.

The petition was demurred to, but the demurrer was overruled, and the defendants thereupon answered upon the merits, and put in issue the various averments of the petition showing a breach of the contract on the part of the defendants. The plaintiff

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recovered, and the defendants thereupon moved in arrest, filed their bill of exceptions, and bring the case here by writ of error.

The merits of the demurrer have been argued at length, but they can not be considered in the present attitude of the case. By answering upon the merits, the defendants practically withdrew and abandoned the demurrer, although it may not have been withdrawn in form. A demurrer admitting the facts and an answer denying them are totally inconsistent with each other and can not stand together. As the demurrer admitted the facts, when it was overruled the plaintiff was technically entitled to judgment. The strictly accurate practice in such case is for the overruled party to withdraw his demurrer and plead to the merits, by leave of the court, where he desires to put the facts in issue. These views, I apprehend, are in accordance with the general understanding of the profession and the previous rulings of this court. The point was distinctly passed upon in *Reyburn v. Bellotti*, 6 Mo. 601; see also *Fuggle v. Hobbs*, 42 Mo. 538.

In the case at bar, if the defendants relied upon supposed technical defects in their antagonist's pleading as a ground of defense they should have stood upon the demurrer and abandoned the case at that point, and thus avoided the wholly fruitless expense of a trial of the issues of fact. Having taken his chances upon those issues, it is now too late to go back and revive their demurrer, and inquire into the technical deficiencies of their adversary's pleading. If the pleadings were radically deficient—that is, if the petition failed to disclose facts sufficient to constitute a cause or causes of action, or there were a defect of jurisdiction—an ample remedy is furnished by their motion in arrest, and that I will now proceed to consider.

The motion in arrest, it may be remarked in the outset, does not bring up any question in relation to the mingling in the same count of different causes of action. That point was maturely considered and definitely settled in *House v. Lowell*, 45 Mo. 381. A motion in arrest is designed to test the sufficiency of the petition, or the sufficiency of the several counts therein. In the case at bar the third and fourth counts are objected to as not containing in either instance a statement of facts sufficient to constitute

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a cause of action. They are supposed to be deficient as not showing the performance or an excuse for the non-performance of a supposed condition precedent.

The contract sued upon, as we have seen, provided that the defendant should furnish the telegraph poles and other materials entering into the construction of the line, at different points along the Mississippi river, in the time and manner therein specified. The contract also provided that the plaintiff should take the poles from the river bank and distribute them along the telegraph line at his own expense; that he should attach the insulators, string the wire and set the poles in the ground in a particular way. The third count is based upon an alleged failure of the defendants to furnish the poles and other material in the time and manner agreed upon. The complaint is not that the material for the first 155 miles of the line was not furnished at all, but that it was not furnished in time. The obligation of the defendants to furnish the material within the time specified was absolute and did not depend upon the action of the plaintiff. Yet the count in question is objected to as not showing the performance of some imaginary condition precedent. As regards this branch of the contract, there was no condition precedent to be performed by the plaintiff. The defendants reverse the order of things. The first step was to be taken by them, namely, to furnish the material upon the river bank. Until this was done the plaintiff was not required to move. The condition precedent was upon the defendants. The plaintiff was not even required to receive the poles at the designated points. They were to be left at these points by the defendants, and that being done the plaintiff was afterward to make the proper distribution of them along the telegraph line. In a word, according to the third count, the defendants agreed to furnish the poles within a given time, and failed to do it, whereby the plaintiff was injured. That is the substance of the case so far as this count is concerned. There was no condition precedent, the performance of which it was necessary for him to aver, or the non-performance of which it was necessary for him to excuse in framing his petition.

The fourth count in substance avers the readiness of the

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plaintiff to complete the whole 214 miles of telegraph line according to the stipulations of the contract, saving delays occasioned by the defendants' negligence, and then alleges that the job was broken up by the wrongful acts of the defendants, and their refusal to furnish the material for the last fifty-five weeks, and thus the plaintiff was prevented from completing the work and subjected to the loss of his just profits. The count is well enough. (*Chamberlin v. Sawyer*, 33 Verm. 80; *Clark v. Mayor*, etc., of New York, 4 Comst. 338.)

As we have already seen, the plaintiff sued to recover damages flowing from different alleged breaches of one and the same contract. The pleader, in framing the petition, treated each breach as a separate and independent cause of action. Whatever objection there may be to the technical accuracy of this mode of pleading, the objection is not available upon a motion in arrest. The objection does not go to the foundation of the plaintiff's right of action, nor can the defendants have been misled or injured by the form of the petition.

I recommend an affirmance of the judgment. Judge Bliss concurs; Judge Wagner absent.

THE ST. LOUIS MUTUAL LIFE INSURANCE COMPANY, Appellant,
v. BENJAMIN CHARLES, Respondent.

1. *Revenue — Corporations, stock of, what liable to assessment.*—Not only the original stock, but all after-acquired capital stock of a corporation in private hands, is liable to assessment under the revenue act of 1864 (Sess. Acts 1863-4, p. 65).
2. *Revenue, action of assessor in matter of, judicial — Collector liable to tax-payer for property irregularly assessed, when.*—The actions of the assessor and that of the board of appeals or County Court, in the matter of taxation, are judicial; and if it appears from the tax list that the assessor has jurisdiction over the property, i. e. that it is liable to tax in any form, though irregularly assessed, the collector is not liable to the tax-payer for the amount collected.
3. *Revenue — Corporation — Capital stock — Shares of stock — Judgment against collector for taxes irregularly assessed, effect of.*—The statute makes a distinction between the liability to taxation of the property of a corporation embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the

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corporation pay the tax, they pay it for the shareholders; and if judgment is rendered against the collector for the amount of taxes collected by him from a corporation, the result of the judgment will be to collect of defendant, for the use of the shareholders, a sum of money in effect paid for them and which they were under obligation to pay.

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, for appellant.

The appellant is a stock corporation organized under a charter given it by the State of Missouri in 1861, with a capital stock of the par value of \$100,000, all paid up. This stock was regularly listed and taxed for the year 1866 for city, county, State and school purposes, and duly paid by the corporation. In addition to this there was assessed for said year against said corporation a tax upon all property owned by it, consisting of money loaned and on hand, amounting to the sum of \$300,000. This was upon its face a void tax bill, and the seizure of the property of appellant by the collector under color of his office, to satisfy the bill, constitutes him a trespasser, and made him liable to respond in damages to the corporation for the injury done by taking its property. The taxes of 1866 were assessed and levied under the revenue law approved February 4, 1864 (Sess. Acts 1863-4, p. 65, § 1). It seems to be the intention of the Legislature to tax the stock of all incorporated companies as a representation of the capital or assets of the company; and as the stock of this company represents the entire value of its property, it was a violation of the foregoing law to levy a tax on the stock and at the same time upon all its assets, which are represented by the stock, and went in to make up and constitute its value. This was double taxation, and contrary to the spirit and intent of the act under which it was levied. It may sometimes happen that it is impossible to avoid what is or appears to be double taxation, but this can never be tolerated unless clearly authorized by the law under which it is levied. This act does not purport to require at the hands of the assessor any such hardship. No property represented by the stock of the company is permitted to be taxed. In this case the stock represents the entire property of the company, and all that is not used to pay the liabilities of the company

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belongs and will go to the stock-owners in the ratio of the number of shares owned by them, and the shares of stock would be taxed in accordance with their value in like manner as other personal property is taxed. (*State v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 265; *St. Louis Building & Savings Institution v. Lightner*, 42 Mo. 421; *State, to use, etc., v. Schacklett et al.*, 37 Mo. 280.)

H. B. Johnson, H. A. Clover, and L. Gottschalk, for respondent.

I. The property of plaintiff is liable to taxation. (Const. of Mo., art. I, § 30; art. II., § 16; 2 Wagn. Stat. 1159, §§ 1, 2.)

II. For the purposes of this case we may admit the general proposition, that the taxation of both the property and capital stock of a corporation is double taxation, and therefore illegal and unjust. (*Hann. & St. Jo. R.R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 263; *Gordon v. Mayor, etc., of Baltimore*, 5 Gill. 231; *McCullough v. Maryland*, 4 Wheat. 316; *Bank v. Mumford*, 4 R. I. 478; *Providence Ins. for Savings v. Gardiner*, *id.* 484; *The Tax Cases*, 12 Gill & Johns. 117; *The State v. Branniso*, 3 Zab. 485; *The State v. Bentley*, *id.* 540; *The State v. Ferris*, *id.* 546; *Salem Iron Factory v. Inhabitants of Danvers*, 10 Mass. 518; *Smith v. Burley*, 9 N. H. 427; *Bangor & Pisgah R.R. Co. v. Harris*, 22 Me. 533.)

III. But the capital stock represents only such property as the corporation is authorized by its charter to hold for the transaction of its business. (*Rome R.R. Co. v. Mayor, etc., of Rome*, 14 Ga. 275; *Mayor, etc., of Baltimore v. Baltimore & Ohio R.R. Co.*, 6 Gill. 288; *Hann. & St. Jo. R.R. Co. v. Shacklett*, 30 Mo. 550; *State v. Flavelle*, 4 Zab. 310; *State v. Mansfield*, 3 Zab. 510; *Inhabitants of Worcester v. Western R.R. Co.*, 4 West. 564.)

IV. The taxation of the property of a corporation, as in this case, not held, used or needed for the transaction of its business, is lawful and proper, even though the capital stock had been also taxed. (*State v. City of Newark*, 1 Dutch. 315; *State v. Newark*, 2 Dutch. 519; *State v. City of Elizabeth*, 4 Dutch. 103;

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Tatem v. Wright *et al.*, 3 Zab. 429; State v. Commissioners of Mansfield, *id.* 510; State v. Flavell, 4 Zab. 370; Vermont Central R.R. Co. v. Burlingham, 28 Verm. 193; Railroad v. Berks County, 6 Penn. St. 70; Souhegan Nail Factory v. McConihe, 7 N. H. 309; 2 Am. Railw. Cas. 306; Inhabitants of Worcester v. Western R.R. Co., 4 Mich. 564; Lehigh Coal & Iron Co. v. Northampton Co., 8 Watts & Serg. 334; State v. Ross, 4 Zab. 497; The E. A. R.R. Co. v. E. C. R.R. Co., 73 E. C. L. 775; Mayor of Norwich v. Norfolk R.R. Co., 82 E. C. L. 397.)

BLISS, Judge, delivered the opinion of the court.

The defendant was tax collector of St. Louis county, and this action was brought against him to recover back the amount of taxes collected of the plaintiff. The petition alleges that the capital stock of plaintiff was \$100,000, all paid in, and that the tax assessment was upon \$300,000, being for money loaned and on hand belonging to the plaintiff; that the company paid the same under protest, and charges "that, under the laws of the State of Missouri, no property of the said plaintiff is liable or subject to taxation for any purpose; that the said capital stock (\$100,000) alone of said plaintiff is subject or liable to taxation under the laws."

The assessment was made under the revenue act of February 4, 1864 (Sess. Acts 1863-4, p. 65), which provides (§ 1) for the taxation "of shares of stock in banks and other incorporated companies," and of "property owned by incorporated companies over and above their capital stock." This was probably an erroneous assessment, but not for the reasons set forth in the petition, for it is not true that only the nominal stock could have been assessed. It is often the case, and the petition shows it to have been so in this instance, that the nominal stock, or the amount actually paid in by the stockholders, represents but a part only of the capital stock of the company. This company had, by its own showing, acquired at least three times the amount of its original stock, all of which in private hands would have

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been subject to taxation. There was no law that exempted it in the hands of the company.

It might have been erroneously assessed, and perhaps should have been considered in valuing the stock in the hands of the shareholders. In that case the stock itself would have been valued at least at \$300,000, for it represented so much taxable property. Or perhaps a portion of this amount was held by the plaintiff "over and above its capital stock." Upon this point the petition fails to advise us, but contents itself with the erroneous statement, in face of the statute, that no property of the plaintiff is liable to taxation. In either case it should have been assessed, either in fixing the value of the stock, or as property held in excess. The fact that the assessment may have been erroneous cuts no figure in this case, for this is not a proceeding to correct an erroneous assessment, but it is an action in the nature of an action of trespass against a public officer for executing a process utterly void.

Tax collectors have always been held to the same measure of liability as sheriffs and constables. The action of the assessor and that of the board of appeals or County Court in the matter is judicial in its character, and, as with sheriffs, etc., the collector need only inquire whether the assessor has jurisdiction over the property—*i. e.*, whether it is liable to taxation in any form—and he need not trouble himself about the regularity of his proceeding. If the tax list shows jurisdiction, he is protected.

This liability was considered in *The Hann. & St. Jo. R.R. v. Shacklett*, 30 Mo. 550, in *State v. Shacklett*, 37 Mo. 280, and in *Glasgow v. Rowse*, 43 Mo. 479. In the former case the collector was held personally liable upon the ground that the tax assessment was illegal and void and the assessor had no jurisdiction over the property, and in the latter case he was exonerated notwithstanding the assessment was erroneous.

In the case at bar the property in some form should have paid the tax. It does not appear that the nominal capital ever had been assessed, either to the shareholders according to the statute or otherwise, or that the plaintiff had furnished the assessor with a list of its shareholders, or that its officers objected to the irregu-

larity of the assessment, or sought to have it corrected by the County Court. The plaintiff has suffered no real injury, and has no right to charge an executive officer for errors in proceedings quasi-judicial, which might have been corrected if the plaintiff's officers had done their duty. It was the collector's duty to collect the tax unless the assessment was void, and it could not be said to be utterly void if the property was subject to taxation.

The statute makes a distinction between the liability to taxation of the property of a corporation embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the corporation pay the tax, they pay it for the shareholders, and if judgment is rendered against defendant in this case, it will be to collect of him, and perhaps of his sureties, for the use of the shareholders, a sum of money paid in effect for them, and which they were under obligation to pay. The statement of the proposition shows the justice and reasonableness of the requirement that those who are irregularly assessed for taxes, when there is an actual liability for them, should avail themselves of the opportunity the statute affords to correct the errors of the assessor. It would be altogether wrong to permit them to lie back for the purpose of making the amount out of the collector, and thus avoiding their liability altogether.

The question of the personal liability of the collector, even if the tax was improperly assessed, was not raised in *Lionberger v. Rowse*, 43 Mo. 67, or *St. Louis B. & S. Association v. Lightner*, 42 Mo. 421, and was not considered in either case; nor should the language of the court in *The First National Bank v. Meredith*, 44 Mo. 500, while considering another question, be understood to imply that a personal action against the collector is the proper remedy for an improper or irregular assessment.

Notwithstanding the apparent irregularity of the assessment, the petition fails to make such a case as should charge the collector personally as a wrong-doer; and the other judges concurring, the judgment will be affirmed.

AUGUSTUS C. MUELLER *et al.*, Defendants in Error, v. WILLIAM
WIEBRACHT, Plaintiff in Error.

1. *Partnership—Verbal agreement, contrary to statute of frauds, binding if carried out.*—In suit on a partnership account it appeared that A. and B., members of the firm, being about to trade with C., agreed with him verbally that payments by the firm should be first applied to satisfy a pre-existing debt owing by A. *Held*, that although the agreement might have been contrary to the statute of frauds, and therefore incapable of enforcement, yet if the parties went on and complied with its terms, and applied the payment to the old account, they could not repudiate it and afterward apply the payments to that of the firm.

Error to St. Louis Circuit Court.

Slayback & Haeussler, for plaintiff in error.

Where one account is with the debtor as executor and the other is in his own right, the law will apply the payment made, when nothing is said, to the debt due from himself individually, and will not allow the creditor to appropriate it to the other demand. (Chit. Cont., 5th ed., 583; Pars. Cont., § 31, and notes.) Nor can a debtor apply payments, where one is barred by the statute, so as to remove the bar of the statute. (Pars. Cont., 5th ed., 630-2; Lowery v. Gear, 32 Ill. 382; Smith's Merc. Law, 672.) Is not this just what is attempted to be done in this case? The plaintiffs are trying to evade the statute of frauds.

If a debtor pay with one intent and the creditor receive with another, the intent of the debtor shall govern. (Reed v. Boardman, 20 Pick. 446; Am. Law Reg. 1865-6, pp. 194-5, 264.) Can there be a doubt as to Wiebracht's intent? Was there any doubt that the money was paid on account of the debt of Schmale & Co.? In this case plaintiffs have never applied the moneys paid to the old balance of \$4,084 due by Schmale, as they say it was agreed should be due, but they have mixed up the account of the firm and the old balance of Schmale, and then applied the payments on their books to the credit of the whole account, new and old, and their own testimony shows that this never was the agreement. (Cole v. Shurtleff, 41 Verm. 311.)

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Plaintiffs proved that Schmale & Co. verbally agreed that the firm would pay off the individual debt of Schmale. This verbal promise came directly within the statute of frauds; there was no consideration. (*Fagan v. Long*, 30 Mo. 222.) Our Supreme Court has held that an incoming partner is not liable for the debts contracted before he enters the partnership. Even an instruction is erroneous saying he was liable if he got the benefit for which the debt was contracted. (Sto. Part. 152, 153.)

Plaintiffs have, as appears by the evidence, the fixed idea that an incoming partner is liable for all his partner's old debts. There was no consideration for such a promise by Wiebracht. The plaintiffs released nothing; they did not release Schmale or any one else. They continued to hold their demand against him, and sold the goods to the new firm on the credit of Schmale, not on that of Wiebracht; there was no novation. (Sto. Part., §§ 156, 157; 2 Pars. Cont., 5th ed., 632; *Edgell v. Tucker*, 40 Mo. 528; *Butterfield v. Hartshorn*, 7 N. H. 345; *Snyder v. Kirtley*, 35 Mo. 423.)

Garesche & Mead, for defendants in error.

I. The application of the payments to the old debt was with defendant's express sanction. But aside from proof, the law is so well settled that the application of payments is at the discretion of the payee, except where paid on a particular account, or the debtor indicates a particular application, that authorities on the subject are unnecessary.

II. The plaintiffs' books were admissible to prove the application of the payments, when the evidence clearly proved that they had been shown to defendant, and that defendant had promised to pay the balance shown by them.

III. The judgment was for the right party. (*Fagan v. Long*, 30 Mo. 222.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs sue for balance of an account which arose from sales of flour to the firm of Schmale & Co., of which the defendant was the surviving partner. Before the formation of the

partnership Schmale had been trading with the plaintiffs, and when defendant came into the firm was owing them a balance of \$4,084. The plaintiffs and their book-keeper testified that Schmale brought defendant to their store, informed them that he had become a partner, and that they wished to continue the trade as before, and that both Schmale and defendant agreed that the payments to be made by them should first apply to extinguish the old debt; but this agreement the defendant denied. It appears that before the death of Schmale the plaintiff made further advances to the amount of \$2,220.75, and Schmale & Co. paid before, and soon after the death of Schmale, the sum of \$4,793, which extinguished the old account and left due upon the new the sum of \$1,511.75, for which the suit was brought. The defendant claims that the payments made by Schmale & Co. should be applied first to the payment of that part of the account which accrued after the firm was created, while the plaintiffs insist that there was an express agreement to apply the payments as the application was actually made.

The court instructed the jury that Schmale & Co. were under no obligation to pay the debt of Schmale, although they had verbally agreed to do so; but if the agreement was actually executed, defendant could not now insist upon a different application of the payments made; to which instruction defendant excepted. Defendant's counsel asked an instruction that the alleged agreement was not binding unless made for a good consideration and reduced to writing, leaving out the qualification as to the execution of the agreement by the actual application of the payments according to its terms; which the court refused to give.

The court committed no error in giving the one instruction and refusing the other. It was for the jury to say whether the defendant agreed, when he entered the firm, and when the plaintiffs continued to extend to it the old credit, that the payments to be made should first satisfy the old charges, and whether they had actually, with his knowledge and consent, been so applied; and there was abundance of evidence to sustain their finding in this regard. But because this agreement might have been contrary to the statute of frauds, it by no means follows,

after the money had been applied in accordance with it, that it can be recovered back, or that a different application can be demanded. No principle is more familiar than that parties may, if they choose, comply with the terms of an agreement that could not have been enforced, and, having done so, they are not at liberty to repudiate it and recover back money paid upon it merely because it could not have been enforced. (Brown on Frauds, § 116.) It is true, if the consideration fails—as if a vendor of land, after having received payment, refuses to convey—the payment may ordinarily be recovered back as for money had and received; but this is a different case. The consideration was mainly between the partners, and the original agreement seems to have been to collect the dues and pay off the debts of Schmale that had accrued in the business. No new account was opened with Schmale & Co., but the additional items were entered in the old account as though no change had been made, and this was the manner in which the account was kept, both on the plaintiffs' books and in the company's pass-book. This view is sustained by the testimony of all the plaintiffs and their book-keeper; and every act of defendant, down to the last payment made by him several months after the death of Schmale, looks in the same direction. It is too late for him now to repudiate the agreement and recall the payments. Had there been any evidence of deception—as that defendant did not understand what he consented to—it should have been submitted to the jury, under proper instructions; but there is no pretense of the kind. He was himself the book-keeper of Schmale & Co., and examined the plaintiffs' books and knew of the application of the money paid, and there is no ground whatever for interfering with the verdict under the instruction.

Counsel object to this instruction and verdict because not warranted by the issues. Plaintiffs sued for balance of account for flour sold and delivered at sundry times. Defendant pleaded payment, which plaintiffs denied. To support the averment of payment, defendant showed the amounts that Schmale & Co. had paid at sundry times, and in reply the plaintiffs showed that these payments were made upon the old account; and if so, they

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clearly were not made upon the account sued on. Counsel assume that the suit was upon the agreement to pay up the old account of Schmale, and this objection has no force upon the issue as actually made.

The other judges concurring, the judgment will be affirmed.

THE FIRST NATIONAL BANK OF KANSAS CITY, Appellant, v.
JOHN HOGAN, Respondent.

1. *Practice, civil—Pleadings—Negative pregnant, what averments not.*—In suit against an insurance company upon a draft, the petition alleged that defendant, "by draft in writing, signed by its secretary," made the obligation sued on. An answer denying that the company, "by its draft in writing, signed by its secretary," executed the obligation alleged, although inartistic, under our system is sufficient.
2. *Bills and notes—Insurance company—Secretary, signature of—Authority.*—A draft signed by the secretary of an insurance company alone is not binding on the company where there was no evidence of any usage or law giving him authority to bind the company.

Appeal from St. Louis Circuit Court.

E. W. Pattison, for appellant.

I. The authority of the secretary was not specifically denied. (20 Barb. 472; 32 Barb. 294; *Dover v. Pacific R.R.*, 31 Mo. 488.) The case of *Wynn v. Cory*, 43 Mo. 301, is not opposed to the above case, nor is it authority in support of the answer in this case.

II. The authority of the agent of a corporation to act, like that of a natural person, may be implied in general from his being held out as an authorized agent of the corporation. (Ang. & Ames on Corp., 5th ed., 313, and cases cited; *id.*, § 284; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Hope Mutual Life Ins. Co. v. Taylor*, 2 Robertson, 282; *Sandford v. Wyckoff*, 4 Hill, 442.) And the secretary is an agent whose powers are of a general character. A contract may therefore be implied from his acts. (Gen. Stat. 1865, ch. 62, § 6; see also *State v. Com. Bank of Manchester*, 6 Sm. & M. 237, as to acts *prima facie*

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binding on a corporation.) A corporation may be bound by the acts of its agents in the same manner as an individual. (N. E. Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166; Allen v. Sea. Fire & Life Ins. Co., 19 Law J. 1850, p. 205; 3 Mason, 506; Smith v. Hull Glass Co., 8 Corn. Bush. 667.)

Terry & Terry, for respondent.

I. In actions against companies upon paper signed by persons purporting to represent such companies, not only their signatures but their authority or official capacity must be proven unless such proof is dispensed with by statute. (2 Pars. Notes, 478; Dwight v. Merrill, 15 Ill. 333; Small, etc., v. Newgate Co., 40 Mo. 214; Marine Bank v. Clemens, 3 Bosw. 600; F. & M. Bank of Kent Co. v. B. & D. Bank, 6 N. Y. 125; 24 Barb. 371.)

II. There is another aspect in which this case presents itself. The draft on which the suit is had is *prima facie* good for nothing.

III. A simple denial is a sufficient answer to a simple allegation of indebtedness. (Westlake v. Moore, 19 Mo. 556; Joy v. Cooley, *id.* 645.)

CURRIER, Judge, delivered the opinion of the court.

The defendant was sued upon his supposed liability as a stockholder in the National Insurance Company of St. Louis. The suit was founded upon a draft or bill of exchange alleged to have been executed by the insurance company. (The form of the allegation was that the company, "by its draft, in writing, signed by its secretary," made the obligation sued on. The answer seeks to put in issue the facts here alleged by denying that the company, "by its draft, in writing, signed by its secretary," executed the obligation as alleged. The denial is inartistic, but sufficient under our system of pleading. (Westlake v. Moore, 19 Mo. 556; Joy v. Cooley, *id.* 645; Wynn v. Cory, 43 Mo. 301.) The petition avers that the draft was drawn by the insurance company; the answer denies it. That is the substance of the averments. The rest is circumstantial. The answer was sufficient to put the plaintiffs to their proofs; and

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as the draft was signed by the secretary, it was necessary for the plaintiffs to show authority in him to bind the company in a transaction of that kind.

It was in evidence that Parker, the party who signed as secretary, in fact acted for the company in that capacity. It was shown that Parker signed the policies and other contracts in behalf of the company, but it was not shown that he ever, except in the instance under consideration, undertook, as secretary and apart from the president, to make a draft as the company's agent. It was in evidence that the by-laws authorized the president and secretary, by their joint signatures, to execute the notes and bills of exchange. It was also in evidence that the by-laws conferred no authority upon the secretary to act on these subjects alone. This appears in the testimony of the plaintiffs' witness, Cravens, who gave evidence in regard to the by-laws without objection. Apart from the by-laws there was no evidence tending to show authority in Parker to bind the company as a party to a draft or bill of exchange, and the by-laws, as we have seen, limited his authority to joint action with the president. Apart from the president he had no powers in this connection, so far as appears.

In the absence of evidence tending to show authority in Parker to sign the draft as the company's agent, the court excluded it when offered in evidence. The plaintiff thereupon took a nonsuit, and judgment was rendered for the defendant. Under the circumstances stated, the draft was no evidence against the company, and the judgment of the Circuit Court will be affirmed. The other judges concur.

EDWIN G. LESLIE, Appellant, v. THE CITY OF ST. LOUIS AND FRANCIS ROMER, Respondents.

1. *Revenue — Land commissioner, proceedings before for opening street — Assessments against adjoining property-owners — Property of can not be sold unless a bargain could not be made with owner of property sought to be taken — Injunction a proper remedy in such cases. — To entitle the city of St. Louis to collect from adjoining property-owners the amount of assessments taxed against them for the opening of streets, under the city charter*

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(Sess. Acts 1867, p. 72, § 2), it must appear that before instituting proceedings before the land commissioner for the condemnation of the property to be taken, an attempt was made with the owner thereof to effect an agreement as to the terms of purchase. The effort to make such agreement was an imperative obligation and constituted a condition precedent to the exercise of the right of eminent domain by the city. And the duty of proving the failure to agree devolved upon the city. The power to take private property for public use, without the consent of the owner, is in derogation of the rights of the citizen, and can only be justified on grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with.

And where no such agreement is shown to have been made, the adjoining property-owner may restrain the city, by injunction, from selling his land to satisfy such assessment. Courts of equity never allow relief by injunction to prevent the sale of personal property; but where real property is about to be sold by a municipal corporation for the payment of taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title, and the court interferes to prevent it.

Appeal from St. Louis Circuit Court.

Shepley, Denison and Allen, for appellant.

I. This case comes within the equitable jurisdiction of the court, and the appellant is entitled to equitable relief. The threatened sale, though void, being under color of legal proceedings, would cast a cloud upon appellant's title to the land, and the courts will interfere to prevent it. (*Lockwood v. City of St. Louis*, 24 Mo. 20; *Fowler v. City of St. Joseph*, 37 Mo. 240; *Pease v. City of Chicago*, 21 Ill. 500; *Uhrig v. The City of St. Louis*, 44 Mo. 458.)

II. Statutes creating corporations, and authorizing them to divest the title to real property by proceedings *in invitum*, should be strictly construed. (*Lind v. Clemens*, 44 Mo. 540; *Reitenbaugh v. Chester Valley R.R. Co.*, 21 Penn. 100; *Vail v. Morris R.R. Co.*, 1 Zab. 189; *Fowler v. City of St. Joseph*, 37 Mo. 238; *Sedgw. Stat. and Const. Law*, 338 *et seq.*; 1 Dutch. 309.)

III. The appellant has a right to object to all irregularities in the manner of exercising the power of eminent domain, because he is sought to be charged with payment of assessed benefit, and

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his burden has been thereby increased. (In the matter of 39th st., 1 Hill, N. Y., 191; Gilbert v. Columbia Turnpike Co., 3 Johns. 107; Dyckman v. The Mayor of New York, 5 N.Y. 434.)

IV. An effort to make an agreement with the owners of the land to be taken for public use, satisfactory to the city council, is a condition precedent to the right of the city to condemn the property, or of the land commissioner to commence these proceedings. (Sess. Acts 1867, pp. 72, 73, art. VIII, §§ 3, 4, 5; Lind v. Clemens, 44 Mo. 540; Reitenbaugh v. Chester Valley R.R. Co., *supra*; 1 Zab. 189; 3 Johns. 107; 5 N. Y. 434; 7 Barb. 498; Abb. Dig. 317, §§ 26-8.)

V. The proceedings must affirmatively show that this precedent condition has been complied with, and no presumption is to be indulged in. (Lind v. Clemens, *supra*.)

Reber, City Counselor, for respondents.

I. This being an injunction bill, the plaintiff must affirmatively show that the law was not complied with, to his detriment; and it is not sufficient to aver that the verdict does not show certain facts, unless by law those facts must appear in the verdict.

II. The ordinance authorizing the judgment on the verdict is warranted by the statute. (Sess. Acts 1867, p. 72, art. VIII, § 2.) And if not, then the verdict must stand as a judgment or assessment, on which execution or warrant may issue. It would be strange if an assessment could be made and yet could not be collected.

III. There was in this case no necessity of making or attempting to make an agreement with the owners of land before proceeding to condemn. The word *can* in the act must be read *shall*.

IV. If the plaintiff has any remedy it is by law — by *certiorari* or trespass.

WAGNER, Judge, delivered the opinion of the court.

The appellant's bill prayed for an injunction to restrain the city of St. Louis from selling certain real estate which had been assessed for benefits upon a pretended condemnation before the

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
land commissioner. A demurrer being interposed and sustained by the court, the allegations in the petition must be taken as confessed. But it is not deemed necessary to examine all the charges, as the two leading questions are decisive. These are: first, whether, before instituting proceedings for the condemnation of the property, it was necessary that an attempt should be made with the owner to effect an agreement in reference thereto; and second, whether injunction in the present case is the appropriate remedy.

The city charter declares that whenever the city council shall provide by ordinance for the establishing, opening, widening or altering any street, avenue, alley, wharf or public square, or route for sewer, and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner or owners thereof, to the satisfaction of the city council, just compensation shall be paid therefor, to the person or persons whose property is so taken, which the land commissioner shall cause to be ascertained by a jury of six disinterested freeholders of the city, etc. (Sess. Acts 1867, p. 72, § 2.)

As no effort was ever made to agree upon any terms with the appellant, who owned the property, and the land commissioner proceeded in total disregard of this provision, we must determine whether it is merely directory or whether it is imperative and constitutes a condition precedent to the exercising the right of eminent domain by the city.

Perhaps no principle has been oftener proclaimed by the courts, or is more firmly established in the very ground-work of the law, than that whenever, in pursuance of authority, the property of an individual is to be divested against his will, there must be a strict compliance with all the provisions of the act authorizing such a proceeding.

The power to take private property for public use without the consent of the owner is in derogation of the rights of the citizen, and can only be justified on grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with. It is no answer to say that certain things in a given enactment, conferring the authority, do not



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appear to be essential. Everything is essential which the law has said should be done before this high prerogative right can be carried out and enforced.

Where the law relating to roads in St. Louis county authorized the seizure of material belonging to individuals for road purposes, "when no private bargain could be made on fair terms," this court held that under the provisions of the enactment the County Court could not authorize a contractor for building a public road to divest the owner of his property for such a purpose when the proof before it failed to show any attempt to make a bargain with the owner. (Lind v. Clemens, 44 Mo. 540.)

So, where the act in Pennsylvania regulating railroad companies provided that if the companies could not agree with the owner or owners of property for the compensation proper for the damages done or likely to be done, or sustained by the owner or owners, then the court should appoint viewers to meet and decide upon the amount of damages and make their report, it was decided that there was no right to petition for the appointment of viewers until an effort had been made to agree upon terms of compensation. (Reitenbaugh v. The Chester Valley R.R., 21 Penn. St. 100.)

In New York, where the statute authorized the exercise of the power in cases where the commissioners and owners disagreed as to the amount of compensation, the court declares that the Legislature manifestly intended to give the owner the benefit and opportunity of a voluntary sale, and required the other party to make a fair and honest effort to purchase the land of him before commencing proceedings to take it adversely. Therefore the disagreement of the parties as to the amount of compensation was a material requirement of the statute and an essential prerequisite to the exercise of jurisdiction in the premises. (Dyckman v. The Mayor, etc., 1 Seld. 484; Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. 107.)

The act provides that when no agreement can be made with the owner or owners of the property to the satisfaction of the city council, then the land commissioner shall cause the amount to be ascertained by a jury of six disinterested freeholders. The failure

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of the parties to agree is the essential prerequisite, and without it the land commissioner has no jurisdiction to proceed. The duty of proving the disagreement devolves upon the city, for the rule is that the party who claims title under the exercise of the right of eminent domain must show affirmatively that the requirements of the statute have been complied with.

The evident intention of the Legislature was that the owner should have the right and opportunity to dispose of his property for a just and fair compensation, before proceedings should be instituted to deprive him of it against his will. This consideration he is entitled to, and it was not designed to deny him this right. The plain language imports this, and to hold otherwise would do violence to its meaning and injustice to the citizen.

The next question is, can the party claim equitable relief and pursue his remedy by the process of injunction? In cases like this the prior adjudications of this court have decided the question in the affirmative. Courts of equity never allow relief by injunction to prevent the sale of personal property, but where real property is about to be sold by a municipal corporation, for the payment of taxes or assessment, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title, and the court interferes to prevent it. (*Lockwood v. City of St. Louis*, 24 Mo. 20; *Fowler v. City of St. Joseph*, 37 Mo. 228.) Wherefore the judgment must be reversed and the cause remanded. Judge Currier concurs. Judge Bliss, being interested in the question, expresses no opinion

CHARLES R. ANDERSON *et al.*, Respondents, *v.* THE CITY OF ST. LOUIS *et al.*, Appellants.

1. *Revenue—Land commissioner—Wharf opening—Attempt at bargain with property-owner—Jury—Change in jurors—Irregularity of proceedings.*—In proceedings before a land commissioner for the condemnation of property for wharf purposes in the city of St. Louis, it appeared that no attempt had been made by the city to effect an agreement with the owner for the purchase of the property before commencing proceedings; that before the verdict of

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the jury had been written out, one jurymen died and another left the country; that thereupon the commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn on different days; and that these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to any of the parties whose property was sought to be taken, that the trial was to be had *de novo*; and this new jury made out and published their verdict. *Held*, that the proceeding was utterly void: 1st, because no attempt was made to effect an agreement with the property-owner prior to the proceedings; 2d, because of the irregularity and palpable violation of the law in the matter of the proceedings for condemnation. But *held*, that in such case injunction by the parties whose property was sought to be condemned would not lie, since they would have a complete, adequate and ample remedy at law, and there would therefore be no necessity for resorting to equity. The trespass in this case sought to be enjoined may be compensated in damages, and, if possession of property were taken, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, where property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, as in the present case, a full and ample means would be afforded to review the proceedings and have their validity passed upon by a common-law writ of *certiorari*.

Appeal from St. Louis Circuit Court.

S. Reber, for appellants.

There is no equity in plaintiffs' bill; their remedy was in the forum of the law court, and they had a perfect and adequate remedy at law. If the proceedings are in a court of record, according to the course of the common law, a writ of error is the proper remedy to reverse and vacate the erroneous judgment; otherwise the remedy is by *certiorari*. (Wales v. Willard, 2 Mass. 120; Sumner v. Parker, 7 Mass. 79; Cushing v. Longfellow, 26 Me. 306; In the matter of Negus, 10 Wend. 38.)

Apparent validity and total invalidity in fact, which can only be established by proof *aliunde*, is the necessary ground of chancery jurisdiction. If partial invalidity only is established, no cause is made for the interposition of equity to remove a cloud. (Ewing v. The City of St. Louis, 5 Wall. 413; Heywood v. Buffalo, 14 N. Y. 534; Nichols v. Sutton, 22 Ga 369; Myers v. Simms, 4 Iowa, 500; Longfellow v. Quimby, 29 Me. 196; Moers v. Smedley, 6 Johns. Ch. 28; Brooklyn

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v. Meserole, 26 Wend. 132; Van Doren v. New York, 9 Paige, 388; Ball v. Humphreys, Iowa, 1854.)

In *Ewing v. City of St. Louis* it was held that with the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or when the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in the matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. In *Moers v. Smedley et al.*, *supra*, it was held that the review and correction of all errors, mistakes and abuses in the exercise of the powers of inferior and subordinate jurisdictions, and in the official acts of public officers, belong exclusively to the Supreme Court. In *Van Doren et al. v. New York*, 9 Paige, 388, it was held that where a valid legal objection appears upon the face of the proceedings, through which the adverse party can alone claim title to the complainant's land, there is not in law such a cloud upon the complainant's title as to authorize him to apply to a court of chancery to set aside such a proceeding.

In England it is well settled that error does not lie when the court whose judgment is complained of acts in a summary manner, or in a new course different from the common law. In the matter of *Negus*, 10 Wend. 38, it was held that in such a case the writ of *certiorari* is the appropriate remedy. In *Ruhlman v. The Commonwealth*, 5 Binn. 26-7, it was held to be a general rule of law that where a new jurisdiction is created by statute, and the court exercising it proceeds in a summary method or in a course different from the common law, a *certiorari* is the only proper remedy. To the same effect see *Savage v. Gulliver*, 4 Mass. 178; *Conn v. Ellis*, 11 Mass. 465; *Edgar v. Dodge*, *id.* 670; *Ball v. Brigham*, 5 Mass. 406; *Bob, a slave, v. The State*, 2 Yerg. 173; 1 Yerg. 92; *Wildy v. Washburn*, 16 Johns. 49; *Sheet v. Francis*, 3 Ohio, 277; see also *Conn v. Coombs*, 2 Mass. 489; *Pratt v. Hall*, 4 Mass. 239; *The People ex rel. Loomis & Bronson v. Wilkinson*, 13 Ill. 660.

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The Circuit Court has power to award a writ of *certiorari* at common law to all inferior tribunals and jurisdictions, whenever it is shown either that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally and no appeal is allowed and no other mode of directly reviewing their proceedings is provided. (The People v. The Mayor, 2 Hill, 9; In the matter of Mt. Morris Square, *id.* 14; Birdsall v. Phillips, 17 Wend. 464; Prindle v. Anderson, 19 Wend. 391; Simpson v. Rhinelanders, 20 Wend. 103; Johnson v. Moss, *id.* 145; *Ex parte* Mayor of Albany, 23 Wend. 277; Nichols v. Sutton, 22 Ga. 369; Myers v. Simms, 4 Iowa, 500; Longfellow v. Quimby, 29 Me. 196; Brooklyn v. Meserole, 26 Wend. 132.)

II. That no attempt was made to come to an agreement with the plaintiffs as owners of the premises, before proceeding to condemn, was wholly immaterial.

H. A. Clover, for appellants.

It is not compulsory on the city to attempt to obtain the right of way by agreement as a necessary condition precedent to the power to condemn and fix the compensation through a jury.

All the prior charters of the city, and the practice under them, must be considered in connection with the charter of 1867, in order to ascertain its true construction. The repeated re-enactment of the terms of the law of February 26, 1835, must be presumed to have been made with a knowledge of the interpretation which had been put upon it by the city in its practical administration. And it must be taken as re-enacted in the sense in which it had uniformly been interpreted in practice. This rule of interpretation is analogous to, if not identical with, that adopted in the construction of the statutes borrowed from foreign States or countries, the rule in such cases being to adopt the construction made by the courts of the country by whose Legislature the statute was enacted. (*Catheart v. Robinson*, 5 Pet. 280.) The seventh section of article VIII of the charter of 1867 seems also to give aid to our construction of the statute.

Why give the statute an interpretation that puts upon the city the necessity of going through the child's play of offering terms

the owner could not accept, or of inviting terms merely for the sake of rejecting them? The agreement must be satisfactory to the city council. It can therefore make its own terms or refuse any agreement at all. The object of the statute was to enforce the constitutional duty of making just compensation for property taken for public use, and to authorize the city to make such compensation by agreement, and in default or absence of such agreement, no matter for what cause, to fix the compensation by a jury of freeholders. Why can not a jury do justice in one case as well as another? Finally, if the city's construction of this statute has been wrong for now more than thirty-five years (which we do not admit), we say *communis error, communis lex*. The case of *Lynd v. Clemens* is not controlling in this case, because it was not on a statute the same in terms as this, though much like it in some of its chief features.

I. Z. Smith, for respondents.

I. No attempt at an agreement with the land-owners was made. (See *Lynd v. Clemens*, 44 Mo. 540.)

II. After the jury had been impaneled and had heard the evidence and the cause was submitted, another jury was impaneled without notice to the land-owners, and only two of the jurors of this last panel were sworn.

III. The small number of witnesses and the flagrantly slight examination made by the second jury shows that they must have relied upon the evidence produced before the previous jury.

IV. The land attempted to be condemned was not needed by the city, and the whole foundation of the city's right is necessity. Plaintiffs' land can not be taken away from them by mere caprice. Nothing but public necessity can deprive them of it. Judge Leonard says, in giving the opinion in the case of *Newby v. Platte County*: "As to eminent domain, * * all writers on public law agree that the State can not rightfully exercise it except in cases of public necessity."

This is a case where a municipality, through mere whim, not impelled by any necessity, nor even by public utility, wantonly and arbitrarily seeks to take private property, not for public use—

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because the city has no use for it—but merely to transfer the title from the private holder, to whom it is useful, to the city, to whom it is useless. Corporations have become so aggressive, under the liberal grants of the Legislature, that there is nothing left but the courts to shield the citizens from the rapacity of these corporations.

WAGNER, Judge, delivered the opinion of the court.

The relief prayed for in this case was to restrain by injunction the defendants from taking possession of or in any manner disturbing the plaintiffs in the peaceable enjoyment of their land, which was claimed to be condemned for a wharf under certain proceedings before the land commissioner. There was also a prayer to restrain the commissioner from issuing certain executions and the marshal from collecting them, and to set aside the proceedings had before the land commissioner and to declare them illegal and void. The court granted the injunction, and the defendant appealed to this court.

The same point arises in this case that was passed upon and decided in *Leslie v. City of St. Louis*, namely: that no effort or attempt was made, prior to proceeding to condemn, to make an agreement with the owner in reference to a sale of the property. This was a violation of the law, and an omission which was fatal to the whole proceeding. There were other irregularities so gross and indefensible in their nature that to approve and uphold them would be sanctioning a departure from well-established legal principles, and would virtually place the property of the citizen at the mercy and caprice of the corporation. It has become too painfully true that under the exercise of the power of eminent domain, gradual approaches have been made upon the rights of property, till it is a matter of doubt whether the owner can rely upon the possession of anything. The fashion is, upon every fancied demand or speculative interest, to despoil the proprietor of his estate.

Whilst there is nothing more important for the interests of society than this right of taking private property, upon just compensation being made, for the public use, yet the right should be

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exercised with the greatest caution and in conformity with the exact and precise limitations of law.

The land commissioner, in his notice preparatory to proceeding to condemn the property, designated a day for impaneling a jury, and a jury was impaneled in accordance therewith. The jury consisted of six men, and had various sessions, and examined about forty witnesses from time to time; they passed upon each and every piece of property proposed to be condemned (there were 1,290 pieces in all), and agreed upon the amounts of assessments and benefits. Before the clerk had written out the result in a formal verdict, and the signatures of the jurors were appended, one of the jurymen died and another left the country. The land commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn in on different days; and these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to the plaintiffs, or to any other of the land-owners, that the trial was to be had *de novo*; and this new jury, as thus impaneled, examined some six or seven witnesses, and then made and published their verdict.

The ordinance provides that when a jury is about to be impaneled for the purposes named, all parties, whether interested in damages or benefits, shall be notified that proceedings are about to be had, and that all such interested parties may appear and attend to their interests on the day and at the place appointed by the land commissioner. This whole proceeding was therefore irregular, and would not be good in a civil action between parties litigating a private matter. The jury were not legally constituted or impaneled; no notice was given; and to say that an individual could be deprived of his property under such circumstances would be worthy only of that state of society where the sentiment prevails,

“That they should take who have the power,
And they should keep who can.”

The proceeding was utterly void, first, because no attempt was made to make an agreement for a fair sale with the owner; and,

secondly, because of the irregularity and palpable violation of the law in the matter of the proceedings upon condemnation.

But the further inquiry arises, whether injunction is the proper remedy. Upon this point I am perfectly clear that it is not. The plaintiffs have a complete, adequate and ample remedy at law, and there is no necessity for resorting to equity. In a very recent decision in this court it was stated that it is now the well-settled principle of equity jurisprudence that the remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages; and the party seeking it must bring himself within this principle before he can be entitled to this remedy. (Weigel v. Walsh, 45 Mo. 560; see also James v. Dickson, 20 Mo. 79; Burgess v. Kattleman, 41 Mo. 480; Echelkamp v. Schrader, 45 Mo. 505.) The trespass here sought to be enjoined may be compensated in damages, and if possession were taken of the property, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, in cases of this description, where the property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, a full and ample means is afforded to review the proceedings, and have their validity passed upon by the common-law writ of *certiorari*.

This very question was recently reviewed and adjudicated by the Supreme Court of the United States in a case taken up, involving a proceeding by the municipal corporation of the city of St. Louis. The only question was whether injunction would lie, and, as the result of the best considered authorities, the court gave it as their conclusion that with the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity would not interfere unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceedings sought to be annulled or corrected were

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valid upon their face, and the alleged invalidity consisted in matters to be established by extrinsic evidence; that in other cases the review and correction of the proceedings should be obtained by the writ of *certiorari*. Therefore it was held that to a bill filed to enjoin the enforcement of certain judgments rendered against the complainant by the mayor of St. Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth as grounds of relief want of authority in the mayor and various defects and irregularities in the proceedings, a demurrer on the ground that a court of equity had no jurisdiction of the matter and that the complainant had a plain, adequate and complete remedy at law was held to be rightfully sustained. (*Ewing v. City of St. Louis*, 5 Wall. 413.)

For the reason that the plaintiffs misconceived their remedy, the judgment will be reversed and the petition dismissed.

Judge Currier concurs. Judge Bliss, being interested in the question, gives no opinion.

RENO BEAUVAIS, Appellant, v. THE CITY OF ST. LOUIS *et al.*,
Respondents.

1. *Leslie v. The City of St. Louis*, ante, p. 474, affirmed.

Appeal from St. Louis Circuit Court.

Henderschott & Chandler, for appellant.

Samuel Reber, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The only question of any importance in this case was decided by this court at the present term in the case of *Leslie v. The City of St. Louis*. In accordance with that decision, the judgment herein must be reversed and the cause remanded.

Reversed and remanded. The other judges concur.

CHARLES L. TUCKER, Appellant, v. GERARD B. ALLEN *et al.*,
Respondents.

1. *Arbitrations — Awards, attestation of, at what time necessary.* — The non-attestation of an award at the time of promulgation (see Wagn. Stat. 143, § 6) does not necessarily vitiate the award. The attestation is a formality that may be supplied after suit on the matters arbitrated has been brought, and after motion to confirm the award had been refused. And *semble*, that no attestation at all is necessary for the purpose of suing on the award where the submission did not provide for a confirmation under the statute.
2. *Arbitrations regarded with favor by courts.* — The Missouri statute concerning arbitration was plainly designed to encourage the adjustment of differences between parties by arbitration by providing a summary mode of enforcing awards and of setting them aside where good cause could be shown for doing so.
3. *Arbitrations — Award — Waiver — Evidence showing waiver of oath is competent.* — A written submission to arbitration is a statutory one, and under the statute touching arbitrations (Wagn. Stat. 143, § 3) the arbitrators must be sworn before proceeding to hear testimony. But the parties to the arbitration may waive the taking of the oath, and evidence of circumstances showing such waiver is competent before a jury.
4. *Arbitrations and awards — What constitutes a valid award to be determined by the court.* — Where an award is offered in evidence it is for the court to determine what facts were requisite to constitute a valid award, and to declare the legal effect of the award when made.

Appeal from St. Louis Circuit Court.

Slayback & Haeussler, for appellant.

I. Arbitrators could not become such without taking the oath. "Arbitrators not sworn can make no award that is binding and valid as a statutory award." (Walt v. Huse, 38 Mo. 210-13, confirming 18 Mo. 399, and modifying and reviewing 28 Mo. 166; 10 Mo. 161; Fassett v. Fassett, 41 Mo. 516.)

II. The award was not signed by the arbitrators.

III. The award was not attested.

Krum & Decker, for respondents.

I. The arbitrator's oath in the case at bar could be waived. (Childs' Ex'r v. Updyke, 9 Ohio, 336; Wood v. Page, 37 Verm. 254; Tombs v. Richmond & Lynchburg R.R., 18 Barb. 583; Valle v. North Missouri R.R., 37 Mo. 445.)

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II. The objection is technical, and even if this were a proceeding by motion (which it is not) the court, if the award were filed in the court, would allow the attestation at any time. (*Newman v. Labeaume*, 9 Mo. 31.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues to recover damages for various alleged breaches of a contract which is set out in the petition. The defendants, among other grounds of defense, plead in bar of the suit an award alleged to have been made in pursuance of a written submission to arbitration of the matters for which this suit is brought. At the trial the award was presented and read in evidence without objection as to its attestation or want of a proper attestation. It appeared in evidence, however, that the attestation upon the award was made after the award was promulgated, and after the overruling of a motion for its affirmance in the Circuit Court. On this subject the plaintiff asked an instruction to the effect that the award was to be treated as invalid in case the jury found from the evidence that it was not attested till after this suit was brought, and after a motion to confirm it had been overruled. The instruction was refused, and the plaintiff complains of the action of the court in that respect as erroneous.

The statute (§ 6) provides that awards enforceable by motion, as contemplated by the seventh section of the act, should be attested by a subscribing witness. The non-attestation, however, at the time of promulgation, does not necessarily vitiate the award. The attestation is a formality that may be supplied at a future period. It has been so held repeatedly. (*Newman v. Labeaume*, 9 Mo. 29; *Field v. Oliver*, 43 Mo. 200.) The objection here is not that the award was not attested, but that the attestation came too late. The instruction is founded upon that idea. It was, I think — and for the reasons already suggested — properly refused. The decisions above referred to show that the attestation may be supplied after the delivery of the award. This court has in fact gone further than that, and pointedly held that no attestation is necessary for the purpose of suing on the award, where the submission did not provide for a confirmation under

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the statute. It was so decided in *Valle v. North Missouri R.R.*, 37 Mo. 445. The judge delivering the opinion in that case says: "This (the attestation) is not made necessary under our statute unless the submission provides that it shall be made the judgment of the Circuit Court and enforced according to the provisions of the statute." The point was distinctly made and was distinctly passed upon. The award in that case was made in pursuance of a written submission, and so under the statute. It was never attested, and was objected to on that ground. But the court held that an attestation was not necessary for the purpose of maintaining a suit upon the award. A large judgment upon the award was accordingly affirmed.

It may be remarked in this connection that courts have ever been disposed to encourage the settlement of difficulties by arbitration. The proceedings in such cases are regarded with favor and construed with liberality. Awards have very rarely been overturned on the ground of the non-observance of unimportant formalities. Our statute was plainly designed to encourage the adjustment of differences between parties by arbitration, by providing a summary mode of enforcing awards. And the statute not only makes provision for enforcing awards when regularly made, but also for setting them aside in a summary way when good cause can be shown for doing so. An award may be vacated, on motion, for any kind of "misbehavior" on the part of arbitrators whereby the rights of either party have been prejudiced. So it may be vacated where the arbitrators either exceeded their powers, or so imperfectly executed them that a "mutual, final and definite award on the subject (of submission) was not made" (§ 9). When parties submit a controversy to arbitration, and an award is made, ought not the party dissatisfied with the result, and who does not propose to abide by it, to move the court to vacate it in some reasonable time? Can he lie by indefinitely, and then, when sued, avail himself of unimportant informalities to defeat the award? That line of action is certainly not to be encouraged. But the arbitrators who made the award now under consideration were not sworn, and that is made a ground of objection to the award. According to the prior decisions of this

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court, the submission is to be regarded as under the statute since it was in writing, and the statute (§ 3) requires the arbitrators to be sworn before proceeding to hear the testimony. (Taylor v. Hayden, 18 Mo. 399; Bridgeman v. Bridgeman, 23 Mo. 377; Walt v. Huse, 38 Mo. 211.) But here the parties to the submission expressly waived the swearing of the arbitrators, as the evidence tended to show and as the jury must have found. Were they competent to do that? In Valle v. North Missouri R.R., *supra*, it was assumed by the judge delivering the opinion of the court that the oath might be waived. In New York, under a similar statute, the point has been distinctly passed upon and ruled the same way. It is there held, not only that the oath may be expressly waived, but also that a waiver may be inferred from surrounding circumstances—as when the parties proceed to a hearing without objection—notwithstanding the non-swearing of the arbitrators. On this subject, Bronson, J., in delivering the opinion of the court in Howard v. Sexton, 1 Denio, 440, remarks: “True, the statute says the arbitrators shall be sworn. But that, like similar provisions in regard to judges and jurors, was only intended to secure to the parties, if either of them desired it, a hearing and decision by persons sworn to a faithful discharge of their duties.” “I can not suppose,” the judge further observes, “that the Legislature intended to prohibit the parties from waiving the oath of the arbitrators.” And so I say in regard to the statute of this State, it is wholly improbable that the Legislature intended any such prohibition. My conclusion, therefore, is that the evidence in relation to the waiver was properly received, notwithstanding the plaintiff’s objections. It was consequently proper for the court to instruct the jury that, if they found the fact of an express waiver, the omission to swear the arbitrators was not material to the validity of the award. (See Howard v. Sexton, 4 N. Y. 157.) Whether the parties executed the written submission read in evidence; whether the evidence under that submission was submitted to the arbitrators tending to establish the alleged breaches of the defendant’s contract, and the damages resulting therefrom; whether the parties expressly waived the swearing of the arbitrators; whether the award was signed by two

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of the three arbitrators who heard the case, were issues of fact, all of which were properly submitted to the jury under the instructions of the court. It was for the jury to pass on these questions; but it was for the court to determine what facts were requisite to constitute a valid award, and to declare the legal effect of the award when made. It has not been shown that the court erred in declaring the law on these points. The court was also asked to instruct in regard to a supposed waiver of the award itself on the part of the defendants. The instruction was refused, and properly, since the pleadings made no such issue. Other instructions were asked by the plaintiff and refused by the court. They were based upon a theory of the law in conflict with the views already expressed in this opinion, and I do not deem it necessary to pursue the subject further.

With the concurrence of the other judges, the judgment will be affirmed.

JOHN YOUNG, Respondent, *v.* THE CITY OF ST. LOUIS *et al.*,
Appellants.

1. *St. Louis, city of—Ordinance—Water-pipe, averment as to necessity of.*
—The act to enable the city of St. Louis to procure a supply of wholesome water (Adj. Sess. Acts 1868, p. 291) declares, among other things, that "whenever the city council shall, by a vote of two-thirds of all the members elected, declare the laying of a water-pipe to be necessary, the board of water commissioners shall cause the same to be laid." An ordinance of the city council authorizing the laying of a certain water-pipe did not in direct terms declare the laying of the same to be necessary. *Held:*
 1. That the ordinance was not for that reason invalid. The passage of the ordinance was equivalent to an averment that the necessity had arisen, and had been declared and acted upon.
 2. A resolution of the council requesting the commissioners to suspend the laying of the water-pipe did not have the binding force of law, nor did it revoke the previous ordinance.
 3. The passage of the ordinance constituted a justification for the proceedings of the commissioners in laying the pipe, although the ordinance failed to show that it was passed by a vote of two-thirds of all the members elected to the council. The commissioners had a right to assume that the ordinance was legally passed. If two-thirds of all the members elected did not vote for it, it was illegal and void, but to determine that matter the proceedings of the council itself should be brought up.

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Appeal from St. Louis Circuit Court.

S. Reber, for appellants.

J. N. Litton, for respondent.

I. In proceedings of this character it must affirmatively appear that the council declared it necessary to lay the pipe. The law is express: they must "so declare." "Necessity" in this case is not synonymous with "expediency." (Commonwealth v. Egremont, 6 Mass. 491; 2 Mass. 271; 29 Conn. 495; Hunter v. Newport, 5 R. I. 329; 23 Me. 9; 2 Pick. 228; Conners v. Swain, 8 Pick. 547; Jones v. Anderson, 9 Pick. 132; Bethel v. County Court, 42 Me. 479; 8 Conn. 164, 243; 9 Conn. 232; 11 Conn. 577; 17 Conn. 197; 1 Dutch., N. J., 434; Mallett v. Kennan, 22 Ala. 484.)

II. It does not appear by the record that the vote was a two-thirds vote, even of those who were present; still less of those who were elected. It must so appear. (See 9 Yerg. 268; Henderson v. Baltimore, 8 Ind. 352; Mallett v. Kennan, *supra*; 1 Cow. 316; 1 Johns. 75; 4 Hill, 76; 3 Greenl. 340; Dougherty v. Hope, 1 Comst. 79.)

The records of this judicial tribunal should show this fact. It is a jurisdictional fact, and every inferior or judicial tribunal other than a common-law tribunal must affirmatively show its jurisdiction. (Iba v. Hann. & St. Jo. R.R., 45 Mo. 475; Hamberger v. Pacific R.R., 41 Mo. 227; 26 Mo. 65; 31 Mo. 264; 37 Mo. 228; 6 Wheat. 119; Hayward v. Charlestown, 3 N. H. 23.)

III. This ordinance was repealed by the resolution. If the ordinance was a declaration that the pipe was necessary, the resolution was a declaration that it was a mistake—that it was unnecessary.

WAGNER, Judge, delivered the opinion of the court.

The *certiorari* issued in this case brings up the record of the board of water commissioners, and the question is whether the action of the board, in making an assessment against the respondent for laying a water-pipe in front of his property on

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Gamble avenue, was legal. The power was exercised under the provisions of an act amendatory to the act to enable the city of St. Louis to procure a supply of wholesome water. (Adj. Sess. Acts 1868, p. 291.)

The law provides that whenever a majority in interest of the property-holders on any street, lane or alley, in the city of St. Louis, shall petition for water-pipe to be laid along such street, lane or alley, or whenever the city council shall, by a vote of two-thirds of all the members elected, declare the laying of water-pipe to be necessary, the board of water commissioners shall cause the same to be laid, and the cost of laying all such pipe shall be apportioned among the owners of property on such street, lane or alley, according to the fronting of their lots thereon.

There was no petition of property-holders in this case, but the board, to justify their action, rely upon an ordinance which was passed by the city council, and which authorized the water commissioners to lay a six-inch water-pipe in Gamble avenue, from High street to Naomi street, and in payment thereof to assess a special tax on the property-holders. The concluding paragraph of the ordinance purports to be passed in pursuance of the act of 1867, when, in fact, the amendatory act of 1868 was in force; but this was obviously a mere clerical error, and does not in the least impair the validity of the ordinance, as the provisions of both acts, so far as the merits of this case are concerned, are essentially the same.

The main and principal objection urged against the proceeding is that the council did not in direct terms declare that the laying of the water-pipes was necessary. There are some authorities that support this view of the case, but it seems to me that they are too technical, and are not founded on those broad considerations which should always be adopted in construing statutes.

The city council in passing the ordinance necessarily exercised the discretionary power given by the statute, and must be presumed to have formed an opinion of the necessity or desirableness of the improvement. I think it was sufficient to show that the council passed the ordinance of authorization; that was equivalent to an averment that the exigency had arisen, had been declared

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and acted upon. Under a somewhat similar provision in a State constitution, which prohibited the granting of special charters except where in the judgment of the Legislature the object could not be obtained under a general law, it was held that it was not necessary to express such judgment in a special charter. (*People v. Bowen*, 21 N. Y. 517; see also *Rector, etc., of Trinity Church v. Higgins*, 4 Roberts, 1.)

But it is further contended that the ordinance was repealed before the work was completed, and therefore the authority was withdrawn. After the adoption of the ordinance and the commencement of the work, the council passed a resolution requesting the commissioners to suspend the laying of water-pipe on Gamble avenue. But this resolution was simply a request; it did not have the binding force of law, and revoked no previous authority.

The objection is also insisted upon that the ordinance constituted no justification for the proceeding of the board, because it did not show that it was passed by two-thirds of all the members elected to the council. But we do not think that was necessary so far as the board of water commissioners were concerned. The council had jurisdiction over the subject, and the board had the right to assume that in the passage of the ordinance the law was properly complied with. If two-thirds of all the members elected did not vote for it, it was illegal and void, but to determine that matter the proceedings of the council itself should have been brought up.

With the concurrence of the other judges, the judgment of the Circuit Court quashing the proceedings will be reversed.

GEORGE COLLINS *et al.*, Respondents, v. MARGARET L. MEGRAW
et al., Appellants.

1. *Mechanic's lien — Married women, separate property of, when liable to lien.*

—A married woman was shown to have had personal knowledge of work done and material furnished on her separate estate, and to some extent to have given personal directions respecting it, although her husband was the principal manager. It was also shown that she joined her husband in the execution of a note in settlement of the claim; the claimants, however, declining to receive the note in adjustment of their demand. *Held*, that under such circumstances the property might be subjected to a mechanic's lien.

*Appeal from St. Louis Circuit Court.**Henderschott & Chandler*, for appellants.

I. To charge the separate estate of a married woman it must appear that she made the engagement with reference to, and upon the faith and credit of, her estate. The court will not impute the intention to charge the separate estate of a married woman when she is living with her husband, but the intention must be clearly shown. (2 Sto. Eq. Jur., § 1401, a.)

II. The plaintiffs, at the time of making the contract and doing the work, had notice that the title to the real estate was not in the husband, but was held by a trustee for the sole and separate use of the married woman; and after the work was so done, made out an account in the name of the husband. Having thereby once given him credit, they can not shift the claim thereafter and charge the separate estate of the wife with the payment thereof.

S. N. Taylor, for respondents.

The separate estate of a married woman is held liable for all her debts, charges, encumbrances and other engagements which she expressly or by implication contracts. The fact that the debt has been contracted during coverture, either as principal or as surety, for herself or for her husband, or jointly with him, seems ordinarily to be held *prima facie* to charge her separate estate without any positive agreement or intention so to do. (2 Sto. Eq. Jur., §§ 1399, 1400; *Hulme v. Tenant*, 1 Brown's Ch. 16; *Heally v. Thomas*, 15 Ves. 596; *Yale v. Dederer*, 21 Barb. 289; *Dyett v. N. A. Coal Co.*, 20 Wend. 370; *Gardner v. Gardner*, 22 Wend. 526; *M. E. Church v. Jacques*, 17 Johns. Ch. 581; *Sadler et al. v. Houston et al.*, 4 Porter, 208; *Long v. White*, 5 J. J. Marsh. 230; *Sanford v. Marshall*, 2 Atkins, 69; *Thomas v. Falwell*, 2 Watts, 11; *Wallace v. Costan*, 9 Watts, 137; *Marshall v. Stephens*, 8 Humph. 159; *Montgomery v. Agricultural Bank*, 10 Sm. & M. 567; *Wilson v. Beeklam*, 8 Leigh, 20, 27; *Harris v. Harris*, 7 Ired. Eq. 112; *Bell & Terry v. Keller*, 13 B. Monr. 384; *Coates et al. v. Robinson et al.*, 10 Mo. 757; *Whiteside v. Cannon*, 23 Mo. 457; *Clafin v. Van Wagoner*, 32 Mo. 252.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding to enforce a mechanic's lien. The legal title to the property sought to be charged, and upon which the labor and material sued for was expended, appears to have been vested in a trustee for the sole and separate use of the defendant, Mrs. Megraw, the wife of one of the other defendants, as her separate estate. The petition avers that the work and material was done and furnished at the special instance of Mrs. Megraw. This averment is controverted. The plaintiffs, however, gave evidence tending to prove the facts as alleged. It was in evidence that Mrs. Megraw had personal knowledge of the work prior to its completion, and that she to some extent gave personal directions respecting it, although her husband was the principal manager. It was also shown that she joined her husband in the execution of a note in settlement of the claim; the claimants, however, declining to receive the note in adjustment of their demand. The trial was by the court. No exception was taken to the evidence, and no declarations of law were either asked or given. The court found in favor of the plaintiffs and rendered judgment accordingly, and I see no occasion for disturbing it.

Courts are uniformly solicitous to protect the rights of married women in respect to their separate property. But married women, like other persons, have duties to perform as well as rights to vindicate. It is as unbecoming in them as in other parties to take unfair advantages. If they look on approvingly and see their separate estates improved by the money and labor of the industrious, it would be a gross injustice to shield the property thus benefited from the usual and appropriate charges in such cases. (Gen. Stat. 1865, p. 768, § 21; *Tucker v. Gest*, 46 Mo. 339.)

Let the judgment be affirmed. The other judges concur.

Hammerstein v. Haase, Garnishee of Schaper.

DANIEL HAMMERSTEIN, Respondent, v. WILLIAM HAASE, GARNISHEE OF WILLIAM C. SCHAPER, Appellant.

1. *Courts, justices'—Appeal—Appearance of appellee after second day of term—Construction of statute.*—A proper construction of section 22 of the act concerning justices (Wagn. Stat. 850) does not require the appellee, in a cause carried to the Circuit Court from a justice's court, to enter his appearance on or before the second day of any subsequent term after the first at which the appeal is triable, in order to procure a hearing. If the appellee appear at such term when his case is called for trial, and announce himself ready, he should be treated as any other party in court upon summons or voluntary appearance.

In case of his appearance the appellant would be entitled to a reasonable time thereafter to prepare for trial.

Appeal from St. Louis Circuit Court.

Krum & Decker, for respondent.

J. W. Colvin, for appellant.

BLISS, Judge, delivered the opinion of the court.

Defendant appealed from the judgment of a justice of the peace after the day upon which the judgment was rendered, but failed to give notice to the appellee. After the case had been continued in the Circuit Court several terms, it was called for trial. The appellee below appeared and insisted upon a trial. The case was passed to another day to enable the appellant to procure his witnesses, but when the day arrived he refused to go to trial because the appellee (the plaintiff) had not entered his appearance on or before the second day of the term. The court, however, heard the cause and rendered judgment against him.

Section 20, of "Appeals," etc. (Wagn. Stat. 850), provides that when the appeal is taken ten days before the first day of the term of the appellate court, it shall be tried at that term, and by section 21 notice is to be given to the appellee if it be not taken on the day when the judgment is rendered. Section 22, however, provides that if no notice be given, the appellee may enter his appearance on or before the second day of the first term, and have a trial at that term or a continuance, at his option. Defend-

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ant contends that because there was no formal entry of appearance on or before the second day of the first term, there can be no trial at any subsequent term unless such entry shall be made on or before the second day of that term. But he entirely mistakes the scope and object of that section. The appellant is at all times in court. The appellee can only be brought there by notice unless he voluntarily appears. (*McCabe v. Lecompt*, 15 Mo. 78.) It is the duty of the appellant to give notice, and he can take no advantage of his failure to do so. The object of section 22 was to enable the appellee to appear and have a trial at once, if he desires it, or at his option to continue the cause at the cost of the appellant, thus imposing upon the latter a penalty for his neglect. The section has no reference to any subsequent term, and if the appellee appears at such term, he should be treated as any other party in court upon summons or voluntary appearance. The court would doubtless see that a reasonable time, after appearance, was given the other party to prepare for trial, and the record shows that an abundance of time was given in this case. But to say that the appellant had a right to another continuance because he had failed to notify the other party of the appeal, and because that party had failed to enter a personal appearance upon the second day of the term, is to give him a bounty for his own neglect, and is contrary to the spirit of the statute.

The other judges concurring, the judgment will be affirmed.

DAVID NICHOLSON, Appellant, v. THE CITY OF ST. LOUIS AND
F. BISCHOFF, Respondents.

1. *Anderson v. City of St. Louis*, ante, p. 479, affirmed.

Appeal from St. Louis Circuit Court.

Geo. P. Strong, for appellant.

S. Reber, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The same questions arise in this case that have just been determined and passed upon in the cases of *Anderson v. City of St. Louis*, *ante*, p. 479, and *Leslie v. City of St. Louis*, *ante*, p. 474. The relief asked for was injunction, and the court sustained a demurrer to the petition. The grounds for injunction are mainly similar to those presented in *Anderson's* case, and for the reasons therein stated we think the judgment was right. Judgment affirmed.

HENRY STAGG, Appellant, v. THEODORE P. GREEN, Respondent.

1. *Wills*—*Executor can not act without qualifying, except when.*—Under the law of this State the executor, by virtue of being so named, has no power to intermeddle with the estate of the testator except under pressing necessity, and only so far as is necessary, until letters have been obtained; although if he shall so intermeddle, and shall subsequently qualify, his letters will relate back and cover his former acts.

Appeal from St. Louis Circuit Court.

P. E. Bland, for appellant.

Cline, Jamison & Day, for respondent.

BLISS, Judge, delivered the opinion of the court.

The petition charges that the defendant made his promissory note to the order of one Linnenfelser, deceased, who devised and bequeathed all his property to his wife Mary, and made her his sole executrix; that his will was duly probated, and his wife, as executrix, sold and indorsed said note to one Kifferer, who indorsed it to the plaintiff, who brings suit upon the note. Defendant demurs for the reason that plaintiff shows no title to the note, the said executrix not having qualified according to law, and having no right to dispose of it.

By the common law, the personal property of the testator vested in the executor, and he might, by virtue of the will, take

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immediate possession of it, dispose of it, and in almost every respect treat it as his own. He was not bound even to wait for its probate, although he could not appear in court until his right had been established by proof of the will. The plaintiff bases his title to the note upon the right of the executrix, as such, to dispose of the personal property of the testator as recognized by the common law, and claims that she is not restrained therein by anything in the statute requiring bond and the taking out of letters.

The doctrine of the common law in this regard has not been adopted in most of the States. The executor here does not, as in England, derive his power solely from the will, but the law imposes certain obligations upon him before he is permitted to execute it. The fact that one is named in the will as executor does not, as at common law, make him executor in fact, but only gives him the legal right to become executor upon complying with the conditions required by law. The statute of our State expressly requires two things of one named as executor before letters can issue to him: first, that he take the oath (§ 16); and second, that he give bond (§ 19). And assuming that the latter requirement is imperative, section 11 forbids any one from intermeddling with the estate except those who give bond, in case more than one person is named in the will.

This question has not been directly before this court, but the view above taken has been everywhere assumed or taken for granted. No executor has ever been recognized as such who has not qualified according to law. The courts of other States, however, have directly passed upon it. In *Monroe, Ex'r of Jones, v. James*, 4 Munf. 194, a person named as executor had sold a slave before he had qualified as such. The other executor named afterward qualified and sued for and recovered the slave. The whole question was fully considered by the court, and the doctrine of the common law acknowledged; but inasmuch as the statute of Virginia required that executors should give bond, the court held that they were not authorized to dispose of the personal property until they had done so. (See also upon the same point *Carpenter v. Goring*, 20 Ala. 587.) In *Stearns v. Burnham*, 5 Me. 261,

the testator had been a resident of Massachusetts and held a note made by a citizen of Maine. His executrix, who duly qualified to act as such under the law of Massachusetts, indorsed the note to the plaintiff, who brought suit as indorsee. The court held that she could give him thereby no power to sue; that she derived her authority from the laws of Massachusetts, which had no extra-territorial force; that she could not sue in Maine herself without qualifying according to its laws; nor could she so pass title in the paper as to authorize another to do so. The contrary seems to be held upon the main question in *Harper v. Butler*, 2 Pet. 239, where the assignee of an executor was permitted to recover in Mississippi upon an assignment made in Kentucky; but the right of the executor to act in the latter State was conceded, he having there duly qualified as executor. (See also *Rand, Adm'r, v. Hubbard et al.*, 13 Pick. 252.)

Counsel insist that the authorities in Virginia and other States can not apply to Missouri because of the different provisions in their statutes; that in those States the executor is absolutely prohibited from acting without giving bond, etc. When the above case of *Monroe, etc., v. James* was decided, the statute then in force provided that a failure to give security should amount to a refusal to act. Our statute (§ 10) provides that after probate of any will, letters testamentary shall be granted to the persons therein appointed executors. But such letters can not be granted unless they qualify by giving bond, etc. If the executor named shall refuse to act, then letters shall be granted to others. By necessary implication he is prohibited from acting as plainly as though the prohibition were direct. (I can have no doubt that under our laws the executor, by virtue of being so named, has no power to intermeddle with the estate except under pressing necessity, and only so far as is necessary, until letters have been obtained, although if he shall so intermeddle and shall subsequently qualify, his letters will relate back and cover his former acts. (2 Redf. Wills, 13, 16, § 2.)

The policy of the law is obvious. The executor is but a trustee; he receives nothing in his own right, but everything for the use of others. Before assuming the relation, before he is

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permitted to take possession of and dispose of property thus intrusted to him, he is required to give ample security for the benefit of those for whom he acts. If he were permitted to first dispose of the property, whether chattels or choses in action, the whole purpose of the law might be defeated. Creditors and legatees might be defrauded, and, if the executor were not responsible, would be without remedy. There is no security to them but to hold him absolutely disqualified to act until he has complied with the requirements of the statute.

The judgment will be affirmed. The other judges concur.

FREDERICK WOLFSON *et al.*, Respondents, *v.* ROBERT T.
UNDERHILL *et al.*, Appellants.

1. Judgment affirmed.

Appeal from St. Louis Circuit Court.

Slayback & Haeussler, for respondents.

Thos. S. Espy, for appellants.

CURRIER, Judge, delivered the opinion of the court.

The defendants are sued as members of the firm of E. T. Simpson, a firm alleged to be composed of Simpson and the defendants. This averment is traversed, and the issue thus formed constitutes the central point of the controversy. In support of the averment the plaintiffs offered in evidence several depositions. To parts of these depositions objections were raised, but to what parts does not appear. It also appears that some of the objections were sustained while others were overruled, but which of them was sustained and which overruled does not appear. The whole matter is involved in unintelligible obscurity and confusion. The struggle on the part of the defendants seems to have been to keep out secondary evidence of the contents of the articles of copartnership between Simpson and his associates. Simpson's deposition, however, fully established the fact of the

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partnership, and of the defendants' liability for the claim sued on, independently of the written articles. Nevertheless, the plaintiffs gave evidence tending to show the loss of Simpson's duplicate copy of the articles, and evidence was given tending to show its contents. No exception to the action of the court on this subject was saved in a way to bring up the matter for re-examination here. Either the ground of objection to the evidence is not stated, or, if stated, no exception is taken to the rulings of the court, or the matter objected to is not pointed out so as to be seen and understood. The objections themselves for the most part are of a purely technical character, and deserve no particular indulgence. I see no objection to the action of the court in giving and refusing instructions. The instruction given presents the merits of the defense.

The judgment will be affirmed. The other judges concur.

**ALEXANDER MILLER et al., Appellants, v. MATTIE BROWN et al.,
Respondents.**

1. *Married women, actions to charge separate property of—Insolvency of husband may be shown in evidence.*—In an action to charge the separate estate of a married woman for goods sold her, the insolvency of the husband may be proved in order to show, first, to whom credit was given, and second, whether the goods were necessities adapted to the condition of the wife.
2. *Married women, actions to charge separate property of—Intent to charge separate estate will be presumed, when.*—In suit to charge the separate property of a married woman for goods sold her, it appeared that she was introduced to plaintiff as a woman of wealth, and, before the debt sued on was contracted, had purchased several bills in her own name, which were always paid on presentation. The bill in suit she promised to pay at different times. Her own testimony showed that she did not intend to charge her separate estate, but did intend to charge her husband; that what she bought were necessities adapted to her condition in life; but she admitted that she bought them in her own name, saying nothing about her husband. *Held*, that as she made the contract for herself, in her own name and on her own credit, the law will presume that she intended to charge her separate estate, notwithstanding her testimony to a contrary intent.

1. Under such circumstances, as against her property, it was immaterial whether the goods furnished were necessities which the husband ought to have supplied.

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2. In such suit against the husband, the proper amount of money to be expended by her for necessities was to be determined by his condition in life, and not hers.

3. It was immaterial whether her debt was evidenced by a written instrument or not. Under the decision in *Whitesides v. Cannon*, the difference between the written and parol promise of a married woman is necessarily ignored. Yet there is this distinction touching the burden of proof: where goods designed for personal or family consumption are sold to the wife on her parol promise of payment, she will be presumed to purchase on the credit of her husband, while purchases made on her written agreement will be presumed to have been made on her separate credit.

Appeal from St. Louis Circuit Court.

Peacock & Cornwell, for appellants.

I. There can be no doubt that a married woman can charge her separate estate by verbal as well as by written contracts. The only difference is that the writing is the evidence and indicates her intention in the one case; while such intention, in the absence of an express statement of her intent to charge, has to be shown from circumstances. The reasoning in the case of *Whitesides v. Cannon*, if good to support a note merely signed by the wife, is certainly good to support her verbal contracts in equity as a charge against her separate estate. See on this subject 2 Ala. 338; 16 B. Monr. 375; *Whitesides v. Cannon*, 26 Mo. 457; 17 Ala. 803, 805-6.

II. It is a clear obligation which rests upon every husband to support his wife; that is, supply her with necessities suitable to her situation and his own circumstances and condition in life. (*Schouler's Dom. Rel.* 76; 2 *Kent's Com.* 146.) But this obligation only goes to the extent of his own circumstances and condition in life.

Lackland, Martin & Lackland, for respondents.

The question has never been decided in this State as to whether a married woman can charge her separate estate by oral contract. The better opinion is that where it consists of real estate the contract charging it must be in writing. (*Clark v. Miller*, 2 Atk. 379.) Where there is no express charge on her real estate, then

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the intention to charge must be contained in the circumstances and facts of the transaction. That intention must be clear. (See *Burch v. Breckinridge*, 16 B. Monr. 482.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs seek to charge the separate estate of defendant Mattie Brown, a married woman, for goods sold her for her consumption. The goods, amounting to \$145, were bought from time to time, and charged to her. She was introduced to the store as a woman of wealth, and, before this debt was contracted, had purchased several bills in her own name, which were always paid on presentation. This bill she promised to pay at different times, and after this suit was commenced asked for an extension of time, and agreed again to pay it. At no time—either when she was purchasing the goods embraced in this or other bills, or when they were presented in her own name, or when she had postponed at different times the payment of the one in controversy, either before or after the suit was commenced—did she make any allusion to her husband, or intimate that the goods were intended to be bought upon his account. The evidence is incontrovertible that the credit was given to her; that she purchased and intended to purchase for herself and with her own means, and the claim now set up that she intended to buy on the credit of her husband is clearly an after-thought. The plaintiffs sought to prove another fact, to-wit: the insolvency of the husband, and a very important one as bearing upon the main question, but were not permitted to do so. After the close of defendants' evidence the plaintiffs' salesman was recalled and asked whether he knew, at the time the debt in suit was contracted, what was the financial condition of Mr. Brown, and if so, whether he was solvent or insolvent? The question was objected to and ruled out, but the grounds of the objection were not stated. It might properly have been considered as out of time, as being part of the plaintiffs' case, although upon so material a point, and especially in an equity proceeding, it would have been a wise exercise of its discretion for the court, even then, to have permitted the question to be put. It was perhaps, however, ruled out as not material to

the issue; if so, the court committed an error, for the known solvency or insolvency of the husband would have been a strong circumstance helping to show to whom the credit was given. It has another bearing upon a point hereafter considered, as showing whether or not these goods were necessities adapted to the condition of the wife, and which the husband was unable to furnish; for, if he could not do so, so much the more would the wife look to her own separate estate for their supply.

The defense is threefold: first, that Mrs. Brown did not intend to charge her separate estate; second, the goods being necessities which the husband was bound to furnish, it could not be so charged; and third, that it could not be charged by a verbal agreement.

Upon the question of intention, the preponderance of evidence is altogether in favor of the plaintiffs' claim; and if the insolvency of the husband had been shown, it would have been overwhelmingly so. The only contradictory evidence is in the testimony of Mrs. Brown. She says she did not intend to charge her separate estate, but did intend to charge her husband, and that what she bought were necessities adapted to her condition in life; but she admits that she bought them in her own name, saying nothing about her husband; that he had been absent about two years, and that she lived from the rents of her own property, and states facts from which we infer that she lived in expensive style. If it had also appeared that her husband was insolvent and unable to pay the bills thus contracted, she would have made against herself a strong case of attempted fraud.

In contracting a debt it is not necessary that the wife say anything about her estate, or even that she have it specially in mind. The question is whether the contract was her own or that of her husband. If she make it for herself, in her own name, then her intention is presumed unless her acts at the time—as by the giving and acceptance of some other security in lieu thereof—show the contrary. A promissory note would clearly establish the contract to be hers; but if she furnish no such evidence, the fact that it was her own contract must be otherwise shown, and, when shown, the intention follows. Mrs. Brown's declaration,

that she did not intend to charge her separate estate when running up a bill in her own name and upon her own credit, would not release her estate from the charge thereby created.

The law upon this subject has been often and fully discussed by members of this court, and it has always been held that, as to her separate property, a married woman is to be regarded as a *femme sole*, and is competent to make contracts or contract debts that shall bind it in equity, whether such property be named or referred to or not. (Coates v. Robinson, 10 Mo. 457; Whitesides v. Cannon, 23 Mo. 457; Tuttle v. Hoag, 46 Mo. 38; Schaefroth v. Ambs, *id.* 114.) In Kimm v. Weippert, 46 Mo. 532, the circumstances were held to rebut the presumption of intention. The practical question, then, is not whether the *femme covert* expressly designs to charge her separate property, but whether she intends to contract a debt of her own; for if she does so, the law, and not her ideas about her property, fixes the liability. If she contracts upon her own credit, it is the credit of such property, for she has no other. This is antagonistic to the doctrine of the South Carolina cases, to some recent decisions in New York and elsewhere, but has long been the settled doctrine of this court.

Secondly, it is claimed that this rule can not apply to the purchase of necessities which the husband should furnish. Whether the articles purchased are necessities or not, is to be considered. The wife has a right, without her husband's consent, to charge him with their purchase, and this right may help to remove a doubt whether she was purchasing upon her own credit or his. But if she should give her own promissory note for the goods, I do not imagine that her right to buy in his name would make that note his contract, nor if the consideration were expressed in the note would it be any the less her agreement. Nor do I imagine, if the goods were simply billed, their character would conclusively show to whom the credit was given. In an action against the husband, the right of the wife to bind him would be very material; but as against her property, if it clearly appears that the credit was solicited by her for herself, and given to her, her husband being unknown in the transaction, it does not matter

whether he ought to have furnished the goods, or whether she could have availed herself of his credit if he had any.

This claim would defeat the chief object of marriage settlements. Kent (2 Com. 165), in speaking of them, says they "are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband." Suppose, for either of these reasons, the husband fails to provide for her support, is she to be deprived of the power to charge her estate to supply herself? She may become surety for her husband, may execute her note or bill to raise money for a hazardous speculation, or for frivolous amusement, but if she be in need of the necessities of life for herself and children, she is shorn of credit, because her husband should furnish them; and as a result, if he can not or will not do so, and has no credit of which she can avail herself, she must go without until she can convert her estate into money.

But there is no evidence that this debt was contracted for such necessities as could be charged to the husband. The bill was not in evidence, and all that appears is that it was for "fine goods;" that it consisted of articles of female apparel, and the only item named was a lace veil. Mrs. Brown testifies that part of the goods were for her children, and says "they were all necessities incident to my condition in life." If this were so—if she were wealthy and bought goods suitable and necessary for her maintenance in a style warranted by her own means—it by no means follows that they were warranted by the estate of her husband, for "it is to be observed that, in estimating what are necessities for the wife, no account is to be taken of the fortune brought by her. The jury must regulate their verdict (in a case against the husband) by the circumstances of the husband when the articles were supplied." (Clancy on Rights of Husband and Wife, 51.) Much less is her fortune to be considered if she really brings him nothing, but holds everything to her separate use. Even if this defense were a good one, her necessities, the character of the goods, and his ability to supply them should have been made to appear; but we are left in the dark upon all these subjects.

Upon the third point, it has been held by many courts that the wife's realty can not be charged for a liability not evidenced by a writing, while others repudiate any distinction in that regard between a written and parol agreement. These opposite views are consistent with the different theories upon the general question adopted by different courts; and in order to decide which view is correct, we must fix upon some principle as a guide to our steps.

The two leading theories are, that as to her separate estate the wife is a *femme sole*; that she may contract debts as though unmarried, for the payment of which her property is holden; and upon this theory it can not matter whether the debt be evidenced by a written instrument or not, if it is established to be her debt. The other theory is that the grant of a separate estate does not give the wife a general credit based upon it, but simply a right of disposition—a power of appointment uncontrolled by the husband—and she can only execute the power in accordance with its terms. Most of the opinions sail between these two theories, now tacking toward one and then the other; but unless the whole subject shall be rendered obsolete by the complete enfranchisement of married women in regard to their property and power of making contracts, through the adoption of the doctrines of the civil law, one or the other of these theories must ultimately prevail with all its logical results. Missouri, as we have seen, has adopted the first theory, and no case has yet arisen where its legitimate corollaries have been denied. The general doctrine elaborated in *Whitesides v. Cannon* has always been followed, and it is there held that the wife has not only an alienable estate independent of her husband which she may “dispose of as a *femme sole* owner, but that she has also the other power incident to property in general—the power of contracting debts to be paid out of it—and that, as her creditors have no means at law of compelling the payment of these debts, equity will subject her separate property to that purpose.” The judge who delivered the opinion in *Kimm v. Weippert*, 46 Mo. 582, after an elaborate review of the cases, expresses his dissatisfaction with the position taken by Judge Leonard, although followed in all the other cases; but I did not then, and do not now, understand him as declining

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to be governed by the doctrine of that case, especially after its so recent affirmance in *Schafroth v. Ambs*. In *Kimm v. Weipert* the husband and wife had purchased certain real estate, paid a part of the purchase money, and to secure the balance executed notes and a deed of trust upon the property. After the lots were sold under the trust deed, and a portion of the notes were left unpaid, the plaintiff discovered separate property of the wife, and sought to subject it to the payment of the balance; but the court held that the trust deed was the "only security intended or thought of by the parties, and that there was no design of charging the separate property of the wife," a conclusion entirely consistent with *Whitesides v. Cannon*, for she and her husband furnished a special and what should have been an ample security to meet her liability. I concurred in that opinion, and I might add that if I were giving private impressions as to what the law should be upon this subject, I should not find it difficult to show results under either theory that, under some circumstances, seem to defeat the supposed object of the creation of such estates, and to suggest modifications more in accordance with my own speculations. But too great confusion in the law upon this subject has already arisen from the attempts of learned chancellors to develop their own ideas, and I feel chiefly concerned to ascertain and declare what is the law as established.

Adhering, then, to the law as settled in Missouri, is there any reason in holding that the wife's indebtedness, in order to charge her real estate, must be evidenced by a written instrument? It is claimed that to hold otherwise would be contrary to the statute of frauds. But it will be at once seen that this view is based upon the theory that a grant of land to the separate use of the wife is but a power of appointment, and that every debt contracted by her is, so far, an execution of the power. If this were so, it might do to say that the execution of the power must be in writing. But the doctrine is a fiction. A promissory note in itself can not operate upon land, and has no more reference to or bearing upon the realty than any debt. If this fiction be warranted by the doctrine held in some States, it is antagonistic to that of Missouri. Our courts have never based the liability of the wife's

estate upon any such idea, but subjected it upon the same ground that all property is subject to the payment of its owner's debts, with this difference: that, owing to the general inability of the wife to contract, the claim is directly upon the property, which can not be reached by a personal action. Thus the reason based upon the appointment theory has no force with us.

Wherever the doctrine of *Whitesides v. Cannon* is held, the difference between a written and a parol promise is necessarily ignored. In *Murray v. Barbe*, 3 Mylne & Keen, 209, Lord Brougham, in speaking upon this point, says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *femme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting her separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds—to require a writing when that act requires none? Is there any equity reaching written dealings with the property which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge upon it if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle." The force of this reasoning, as applied to our interpretation of the law, is not impaired by the subsequent opinion of Lord Cottenham in *Owens v. Dickinson*, 1 Craig & Ph. 58, and quoted in part in *Kimm v. Weippert*, for the reason that he denies the whole doctrine of *Whitesides v. Cannon*, to which we adhere. Judge Story, while leaning to the doctrine that the general indebtedness of the wife will not charge her separate estate, acknowledges (Com. on Eq., § 1400) that the reasoning that would hold it liable for her bond or note would equally apply to all her general pecuniary engagements. So, in *Ozley v. Skelheimer*, 26 Ala. 332, the court holds "that a *femme covert*, as to her separate estate, can enter into contracts in the same manner as a *femme sole*, and that her contracts, whether written or

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verbal, are equally binding, and do not operate upon the principle of appointments." In none of the Missouri cases did the court consider whether there was a distinction between a written and a parol agreement, although in all—to one as the other—the reasoning would apply as well.

Yet there is this difference: when the wife places her own name to a written instrument she can not deny that it is her agreement; but when charged upon a parol promise, there is room for doubt; and in a sale of goods the creditor should be required to establish affirmatively that they were purchased upon the sole credit of the wife; for the presumption would be, unless the contrary appears, that when the wife purchases articles of personal and family consumption, she does it upon the credit of her husband.

In order to liquidate this claim it will probably not be necessary to sell any property of Mrs. Brown. The judgment will be reversed and the case remanded, with directions to the Circuit Court to ascertain the income from the several lots described in the petition, and if the debt can be satisfied from such income within a reasonable period, to place one or more of them in the hands of a receiver with directions to collect the rents until a sufficient amount shall be received to pay the plaintiff's claim, the costs of the suit, and his compensation, to be fixed by the court.

Judge Currier concurs. Judge Wagner expresses no opinion.

RICHARD ENNIS *et al.*, Appellants, *v.* JOHN HOGAN *et al.*,
Respondents.

1. *Practice, civil—Pleadings—Answer—Reply—New matter—Judgment.*
—In suit under the statute against a stockholder in a corporation, defendant, after admitting the insolvency and dissolution of the corporation as charged in the petition, alleged that his stock was paid in full, and that he had in addition paid corporation debts to an amount exceeding the total amount of his stock. *Held*, that the answer set up new matter which could alone be put in issue by a reply; and there being no reply, the facts stood admitted, and the judgment followed as of course. An averment in the answer of the medium of payment—as that it was in money—was wholly unnecessary.

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2. *Practice, civil — Pleadings — Reply, when result of accident or mistake, may be set aside.*—Where the failure to reply is the result of accident or mistake, the judgment may be set aside on reasonable terms where the motion to set aside is made in the term.

Slayback & Haeussler, for appellants.

No reply was required in this case. The answer does not confess and avoid the allegation of the petition; does not admit the claim against the defendants by the plaintiffs, and then show a demand existing in favor of the defendant against the plaintiffs; is not new matter, nor is it a counter-claim within the meaning of the statute. "The practice act only requires a reply when the answer contains new matter constituting a counter-claim." (*Carpenter v. Meyers*, 32 Mo. 213; see generally *Holzbauer v. Heine*, 37 Mo. 443-4; *Jones v. Moore*, 42 Mo. 413; *Gen. Stat.* 1865, p. 686, § 26; *Elliot v. Leak*, 4 Mo. 540; *Branstetter v. Rives*, 34 Mo. 318; *Nordmanser v. Hitchcock*, 40 Mo. 178; *Downing v. Still et al.*, 43 Mo. 309; *O'Fallon v. Davis*, 38 Mo. 269; *Stout v. Lewis*, 11 Mo. 438; *Arnold v. Palmer*, 23 Mo. 411.) That the assertion of having procured the satisfaction of a judgment in a certain amount is no plea of payment of that amount, this court has distinctly held in the case of *Lingle et al. v. National Ins. Co.*, 45 Mo. 109-10.

Terry & Terry, for respondents.

CURRIER, Judge, delivered the opinion of the court.

The defendants had judgment on their answer for want of a reply, and the question here is, was the judgment warranted? In other words, did the answer contain new matter constituting an affirmative defense?

The alleged indebtedness sued for was originally contracted by a private corporation, in which each of the defendants held \$3,000 of stock. It is on that ground they are sought to be held to personal liability, the corporation in the meanwhile having become insolvent and been dissolved. The defendants in their answer admit the alleged insolvency and dissolution, and their alleged relation to the corporation as stockholders, and then allege a state

of facts not adverted to in the petition, in avoidance of their supposed liability, to-wit: that their stock was paid in full, and that they had in addition paid corporation debts to an amount exceeding the total amount of their stock. Here is a plain case of confession and avoidance. The defendants admit every fact alleged against them as stockholders, and then avoid liability by showing other and additional facts. They do not aver payment of the debts sued for, but the payment of other corporation liabilities whereby their liability as stockholders has been discharged. So far as this branch of the case is concerned, it makes no difference that the defendants put in issue the fact of the alleged corporation indebtedness to the plaintiff. It is not alleged that that indebtedness has been paid, and were it so alleged I fail to see that it would make any difference with the point under consideration. The case is wholly unlike *Van Giesen v. Van Giesen*, 10 N. Y. 316, and other like cases to which counsel have referred.

If these views are well founded, and I think they are, it follows that the answer contained new matter which could alone be put in issue by a reply. There being no reply, the facts constituting the defense stood admitted, and the judgment followed as a matter of course. (2 Wagn. Stat. 1017, §§ 15, 16.)

Had the failure to reply been the result of accident or mistake, the judgment should doubtless have been set aside, on some reasonable terms, had the court been asked to do so in season—that is, during the term. But here the motion to set aside was not made till several terms after the judgment was rendered, and came too late, and was properly overruled. Some criticism has been made upon the form of the answer averring payment of corporation indebtedness. The allegation is that the defendants paid off corporation debts (in one case a judgment against the corporation directly, and in the other a judgment founded upon corporation indebtedness) to an amount (specifying the exact amount) exceeding the stock held by the defendants respectively. The point is taken that the “answer does not say that either of said defendants paid money” in satisfaction of the judgment. The averment of the medium of payment was wholly unnecessary. The answer shows a *prima facie* defense. If the plaintiffs

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wished to put in issue the good faith or the amounts of the payments they should have replied, making the proper averments. It is too late now to criticise the answer in respect to mere matters of form. The judgment cures all mere formal and technical defects.

The judgment must be affirmed. The other judges concur.

AUGUSTINE M. DALY, Respondent, v. OWEN V. TIMON,
Appellant.

1. *Practice, civil — Weight of evidence — Referee.* — Issues triable by a jury may be referred to a referee, and in that case the referee is the sole judge of the weight of evidence, subject to review by the trial court. Appellate courts will not examine his decision touching weight of testimony.

Appeal from St. Louis Circuit Court.

James A. Beal, for respondent.

Bakewell & Farish, for appellant.

BLISS, Judge, delivered the opinion of the court.

This was an action upon an account, and is among the class of cases in which the issues of fact are triable by jury. These issues, by consent of parties, were referred to a referee, and defendant excepted to his report, but it was sustained by the court and judgment rendered upon it. The case is brought here by appeal, and defendant asks us to reverse the judgment for the reason alone that the report of the referee was against the weight of evidence. The trial court had the right for this reason to set aside the report, but it is no error of law to refuse to do so. Issues triable by jury may be submitted to the court or referred to a referee, and in either case the jury, the court, or the referee, are the sole judges of the weight of evidence submitted to them, subject to review as before stated. It is against all principle and precedent for us to interfere unless some error of law is shown in proceedings.

The judgment is affirmed. The other judges concur.

Mason, Trustee of Mason, v. Payne et al.

EDWIN R. MASON, TRUSTEE OF MARY C. MASON, Appellant,
v. EDWARD H. PAYNE *et al.*, Respondents.

1. *Equity — Action to divest title — Agreement, when of the essence of a contract — Payment stipulated in cases affecting minors — What sufficient compliance with stipulation.*—In suit by a lessee against the heirs of his lessor, to divest title out of defendants and vest it in plaintiff, it appeared that by the terms of an agreement between the parties plaintiff was to have the privilege of purchasing the fee simple at any time within five years, but was required, if he elected to purchase, to give thirty days' notice of his intention to purchase, and to make payment of one-fourth. *Held:*

1. That notice given two days before the expiration of the five years was too late.

2. That defendants being minors, it was sufficient for plaintiff to aver his readiness to make the payment called for and to pay the money into court, subject to its order.

3. That the thirty days' notice was of the essence of the contract. The offer to sell within five years was simply a proposition without mutuality between the parties. For that reason time was of the essence of the agreement, and the acceptance must have been in accordance with the offer.

4. It was immaterial that defendants, being minors, were unable to convey. The notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance.

Error to St. Louis Circuit Court.

Gray, Jewett & Hamilton, for appellant.

This suit was brought to the April, 1869, term of the St. Louis Circuit Court, to divest title out of respondents and to vest it in appellant, Edwin R. Mason, as trustee of Mary C. Mason. This was an offer to sell, and if there is any doubt as to the terms and conditions of sale, it will be construed against the vendor. (Page v. Hughes, 2 B. Monr. 442; D'Arras v. Keyser, 26 Penn. 254; Souffrain v. McDonald, 27 Ind. 276; Kerr v. Purdy, 50 Barb. 24; Collins v. Van Dorn, 1 Clarke, Iowa, 578; Seaton v. Mapp, 2 Coll. C. C. 556; Greaves v. Wilson, 25 Beav. 293.)

In general, it is sufficient if the plaintiff offers in his petition to make payment and to perform the contract on his part. For the reasons stated, a formal tender before suit would in this instance have been unavailing. (Stevenson v. Maxwell, 2 Comst. 415; Morris v. Hoyt, 11 Mich. 18; Kerr v. Purdy, 50 Barb. 24.)

Mason, Trustee of Mason, v. Payne et al.

J. N. Straat, for respondents.

BLISS, Judge, delivered the opinion of the court.

Defendant's ancestor executed to the plaintiff a lease of certain lands in St. Louis county for the term of one hundred years, which lease contained the following agreement:

"And it is further agreed that at any time within five years from the date of these presents, said party of the second part, his heirs or assigns, shall have the privilege of purchasing the fee simple of the aforesaid described tract of land hereby leased, the said party of the second part paying therefor at the rate of \$200 per acre, one-fourth paid down in cash and the remainder to be paid in three equal annual payments from the date of said purchase, with six per cent. interest thereon, payable annually, the whole to be secured by a deed of trust on said land. In case said party of the second part elects to buy said tract of land as above, he shall give said party of the first part, or his legal representatives, thirty days' notice, in writing, of his intention so to do."

Two days before the expiration of the five years the plaintiff gave notice to the defendants, who are the heirs of the lessor, of his election to purchase, and brings this suit for specific performance. It is admitted that if the plaintiff has complied with the contract in regard to the purchase, or that such compliance has been rendered unnecessary, he is entitled to a conveyance. 1. The lessee and plaintiff had the privilege of purchasing at any time within five years. 2. He was required, if he elected to purchase, to give thirty days' notice of his intention to make a payment of one-fourth, etc.

It will be seen that the term of five years was not given him in which to come to a conclusion whether he would purchase or not. Nothing is said in the first paragraph upon that subject, although without the second the time when such conclusion had been arrived at would be of no importance. But the lessee must be ready to purchase and ready to receive a deed within the five years, and hence must have performed the conditions that would obligate the lessor to convey. These conditions were payment

and the thirty days' notice. So far as the payment is concerned, the plaintiff has doubtless done all he could under the circumstances. The defendants are minors and could not receive the payment due them if it had been tendered, nor could they make a deed. It would therefore have been an idle ceremony to make a formal tender and demand; and so far it was sufficient to aver, as he has done, that he is ready to make the payment to any one authorized to receive it, and to bring the money into court subject to its order. (*Collins v. Van Dorn*, 1 Iowa, 578; *Kerr v. Purdy*, 50 Barb. 24; *Page v. Hughes*, 2 B. Monr. 442.)

The plaintiff claims also that the notice was in season—that it was sufficient to give it within the five years. But the notice must have reference to some future time or event or obligation. It can not mean thirty days before he forms an intention or makes an election to purchase, for it is a notice of such intention or election already formed. It must mean thirty days before the plaintiff is entitled to purchase, or the requirement has no significance, and he is not entitled to purchase after the five years. But the plaintiff objects that we deduct thereby thirty days from the time within which he may make his election, and thereby so far defeat the contract. This objection would be reasonable if the contract gave the plaintiff five years within which to form his intention; but instead of that it gives him thirty days less than five years, by giving only five years to purchase, and requiring thirty days' notice of his intention to do so. If there was a reasonable doubt in regard to the intention of the parties we might invoke the familiar maxim that doubtful conditions are to be construed most strongly against the vendor. But there is no such doubt. So in regard to time when a notice should be given of intended application to court. (*Underwood v. Dollins et al.*, ante, p. 259.)

Such being the obvious meaning of the agreement, is this notice of the essence of this contract? We often see the broad statement that in equity time is not of the essence of the contract, and as often the reverse. But the subject is hardly capable of such generalization. Contracts are made by parties and not by courts, and when it is obvious, from its examination,

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that they intended to make time of the essence, courts will not declare the contrary. Yet in such case, when the strict enforcement of the stipulation would work a forfeiture or a great sacrifice, they will scrutinize the action of the other party, to see whether it has not been waived or whether he has taken the proper steps to take advantage of its non-observance. In the present case that part of the agreement offering to sell was but a proposition, and if accepted according to its terms it would become a binding contract; otherwise not. There was no mutuality; and were the lessor alive, or were his heirs of age, and so situate as to be able to comply with the offer, there could be no question as to the plaintiff's failure to take the steps necessary to perfect the agreement.

It is claimed, however, that inasmuch as the vendor was dead, and those in whom the title vested could not convey, the reason for the notice ceased and it should be dispensed with. But its object was two-fold: first, to give the vendor ample time to comply with his offer; and, second, it was the stipulated evidence of election to purchase—an election to be made and communicated at least thirty days before the expiration of five years; in a word, it was the acceptance of the offer of sale. Where there is a want of mutuality, as in offers of this kind, time is an essential part of the agreement, and the acceptance must be in accordance with the offer. There is no evidence that the plaintiff elected to purchase until twenty-eight days after he was required to communicate his intention. This election was as necessary after the death of the lessor as before, and the necessary action by the lessee could not be dispensed with by such death. It does not matter that defendants were unable to convey; the notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance—a stipulated act that would convert a proposition into a contract.

The other judges concurring, the judgment will be affirmed.

PATRICK MORRISSEY, Respondent, v. WIGGINS FERRY COMPANY,
Appellant.

1. *Damages — Negligence, contributory.*—One person will not be allowed to impute a want of vigilance to another injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on his part.
2. *Evidence — Parish registers of another State not competent evidence unless shown to be authorized by laws of that State — Statute law must be proved like any other fact.*—A parish registry, showing the date of a child's baptism, is not competent evidence of his birth or his identity. Nor is it competent as evidence at all unless it appears in proof that such registry is required to be kept by the laws of the State from which it is taken; and the statute of another State on this point must be proved like any other fact. No presumption can arise in reference to such statutes, nor will courts take judicial notice of them. In the absence of all proof the courts of this State will presume that the general principles of common law prevail in other States.

Appeal from St. Louis Circuit Court.

For the main facts in this case see 43 Mo. 380.

S. N. Holliday, for appellant.

The court erred in excluding the Buffalo depositions offered by defendant. (*Childress v. Cutter*, 16 Mo. 24.) We understand the rule, as declared in that case, to be that if the country where such registers are kept recognizes them as authentic, they will be admitted here. In New York, where these depositions were taken, entries of baptisms and marriages from church registers are admissible in evidence, independent of any statute declaring them admissible. (*Jackson v. King*, 5 Cow. 237-8, 241; *Maxwell v. Chapman*, 8 Barb. 579; *Jackson v. Boneham*, 12 Johns. 226; *Blackburn v. Crawford*, 3 Wall. 189; *Lewis v. Marshall*, 5 Pet. 470; *Hyam v. Edwards*, 1 Dallas, 2; *Lathrop v. Lawson*, 10 La. Ann. 238; 10 East, 109; 15 East, 32; *Kingston v. Leslie*, 10 Serg. & R. 383.) It is not true that only church registers of the established church are received in England. In the old case of *Hyam v. Edwards*, 1 Dallas, 2, the marriage register and that of births of Quakers were admitted in evidence. That decision has been followed by many others, cited in the cases referred to in East's Reports.

Morrissey v. Wiggins Ferry Co.

Morris & Peabody, for respondent.

The depositions taken at Buffalo, N. Y., were clearly inadmissible. The baptismal entry there mentioned was not required by law to be made. (*Mullanphy v. Cutter*, 16 Mo. 24, 45; *Haile v. Palmer*, 5 Mo. 403, 417; *Richmond v. Patterson*, 3 Ohio, 368; *Erickson v. Smith*, 38 How. Pr. 454.) In the absence of proof to the contrary, the law of New York as to this question is presumed to be the common law. There is no legal presumption that the statute law of that State is the same as our own. (*Whitford v. The Panama R.R. Co.*, 23 N. Y. 465.)

The entry in question was not properly proved: 1. Because the original entry was not produced. 2. Because a person other than he who purported to have made said entry testified to its contents. 3. Because the signature or handwriting of the person who purported to have made said entry was not proved. 4. Because, at the time the witness swore to the contents of the entry, there was no evidence that the person who purported to have made it was dead. The party who made the entry must testify to it if not proved to be dead. (*Merrill v. Ithaca & Oswego R.R.*, 16 Wend. 595; *Brewster v. Doane et al.*, 2 Hill, 537; *Wilbur v. Selden*, 6 Cow. 162.) 5. Because there was no legal and competent evidence that the person who purported to have made said entry was dead. After the witness testified to the contents of the entry, he further testified that the person who purported to have made it was *reputed* to be dead. Death can not be proved by reputation except under particular circumstances, which were not proved to exist in this case. (*Steward v. Stephens*, 26 How. Pr. 244; *Cole v. Moffett*, 20 Barb. 18; *Fosgate v. Herkimer, etc.*, 12 Barb. 352; *Wilson v. Brownlee et al.*, 24 Ark. 586, 589.)

There was no foundation laid for the admission of said deposition in evidence, because there was no proof that the child mentioned in said entry of christening was the child in question. The defendant must prove the identity of the child mentioned in the entry of christening with the child in controversy. (1 Greenl. Ev., 10th ed., § 493; *Barber v. Holmes*, 3 Espin. 190; *Birt v. Barlow*, 1 Dougl. 171.)

WAGNER, Judge, delivered the opinion of the court.

When this case was here on a former occasion the judgment was reversed on account of the ruling of the court below in refusing certain instructions asked by the plaintiff. (*Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380.) After the case was remanded and upon a new trial, the law was declared in conformity to the rules laid down by this court, and there is now no controversy upon the question of instructions. But the defense was based upon two propositions: 1. That the accident was not caused by the negligence of the defendant, its officers or agents. 2. That the deceased daughter, Anna Morrissey, was over eighteen years of age at the time the accident occurred.

If there was not a total failure of proof, or in other words, there was sufficient evidence to authorize the case to be submitted to the jury, the first proposition is not maintainable in this court. The jury, as the triers of the fact, were the proper judges of negligence, and by their finding we are concluded. As the defendants were carriers of passengers for hire, extraordinary care was required of them, and they were liable for slight neglect. The light was turned in such a direction that it shone full upon the boat, but left everything outside in darkness. Had it been turned so as to have reflected on the water, the accident would probably have been averted. The lower or iron bar at the gangway was left down entirely, and it seems that when that was taken away passengers were accustomed to leave the boat and go underneath the upper bar. These were all acts of omission, from which the jury might reasonably infer or deduce negligence. From the fact that the iron bar was down, and that the light negligently and wrongfully obstructed her view, the deceased was misled and lulled into a false security, and it does not appear that she was looking in a direction different from that in which she was going, or that she was not observant of her steps. It was not imprudent in her to act upon the presumption that those in charge of the boat would conduct themselves in accordance with her rights and their duties. A defendant will not be allowed to impute a want of vigilance to one injured by his act, as negligence, if

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that very want of vigilance were the consequence of an omission of duty on the part of the defendant. The evidence was abundantly sufficient to justify the court in submitting it to the jury and it is absurd to say that there is a total want of proof to sustain the verdict. It is insisted that the court committed error in not permitting the witness, Keith, to give his impression as to the age of the deceased. The witness stated that he should judge Miss Morrissey was from twenty to twenty-five years of age. But so far as the record shows it does not appear that the testimony was ruled on, or that it was even objected to, or that any point was made upon it in the court below. There is nothing, therefore, in this respect which requires our notice.

The remaining question is the action of the court in excluding certain depositions taken by the appellant in Buffalo, N. Y., for the purpose of proving the age of the deceased. The deposition objected to was a copy of the record kept in St. Patrick's church at Buffalo, and stated that the priest then officiating there, on the 17th day of December, 1846, baptized Jane (or Johanna), daughter of Patrick Morrissey and Judith Fitzgerald, born on the 10th day of that month. The keeper of the archives, who made the certificate, deposed that the registry was required to be kept by a rule of the Catholic church, but it does not appear that there was any law of the State of New York authorizing it. The general principle is that to entitle records to be received in evidence they must be public documents or official registers which are sanctioned or authorized by law. (1 Greenl. Ev., §§ 483-5.) But it is to be remembered that they are not, in general, evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus a parish register is evidence only of the time of the marriage and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry; so, a register of baptism, taken by itself, is evidence only of that fact, though if the child were proved *aliunde* to have been very young, it might afford presumptive evidence that it was born in the same parish. Neither is the mention of the child's age in the register of christenings proof of the day of his birth, to support a plea of infancy.

In all these and similar cases the registry is no proof of the identity of the parties there named with the parties in controversy, but the fact of identity must be established by other evidence. It is also necessary, in all these cases, that the register be one which the law requires should be kept, and that it be kept in the manner required by law. (1 Greenl. Ev., § 493.) In *Haile v. Palmer*, 5 Mo. 403, it was held that to render sworn copies of papers purporting to be records admissible in evidence, it must be shown that by the laws of the State where such records are made the papers are required to be recorded.

In the case of *Childers v. Cutter*, 16 Mo. 24, this court decided that church registers were not admissible in evidence, except by special statute, unless they were by the civil law of the country or State where kept recognized as documents of an authentic and public nature. In England, where there is an established church recognized by law, with authority to legislate in respect to parochial registers, the registers made and preserved by the clergy of the established religion are deemed authentic, and copies duly proved are admissible. This authenticity, however, is denied in respect to dissenters, and to make their registers evidence the law must be adduced authorizing them. In this country, where there is no religion established by law, all church registers, like those of the dissenters and foreigners in England, are unauthentic and not regarded as public documents in our courts. (Scott, J., in *Childers v. Cutter*, *supra*.)

We have now a statute making church registers of marriages, births, baptisms, deaths or interments evidence in this State, where such registers are required to be kept by the ordinances or customs of any religious society or congregation in the State. (Wagn. Stat. 593, §§ 19-20.) But this only extends to our own internal polity, and depends upon a positive municipal regulation.

There is no presumption indulged that the statutory law of New York is the same as ours. As a general rule, courts do not take notice of the laws of a foreign country except so far as they are made to appear by proof. Where the condition of the law of another State becomes material, and no evidence has been offered concerning it, our courts will presume that the general principles

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of the common law, which we always consider to be consonant to reason and natural justice, prevail there. But no such presumption obtains respecting the positive statute law of the State. There is generally no probability in point of fact, and there is never any presumption of law that other States or countries have established precisely or substantially the same arbitrary rules which the domestic Legislature has seen fit to enact. (*Whitford v. The Panama R.R. Co.*, 23 N. Y. 465.) As no attempt was made to show that the registry was required to be kept by any authority of law, we think that the deposition was inadmissible, and therefore rightly excluded. Moreover, there was no attempt to show that there was any identity between the parties named in the registry and the parties in controversy here.

Without this additional proof the evidence had no tendency to support the defendant's case. Wherefore the judgment must be affirmed. The other judges concur.

JOHN HARTT *et al.*, Respondents, v. JOHN MCNEIL, Appellant.

1. *Attachment — Replevin — Evidence in what, proper.* — Certain goods having been seized by a sheriff on attachment as the property of A., were replevied by B., whereupon the sheriff admitted the taking, and justified on the ground that the goods were the property of A., and were taken in virtue of the attachment. In the replevin suit it was proper for B. to show that A. made to him false representations as to his financial standing, as going to prove that the goods were procured fraudulently. It was not competent, however, for the sheriff to show that A. had pledged the goods sued for, while yet in his possession, as security to a third party for borrowed money. Such testimony was not germane to the issues involved.

Lubke & Player, for respondents.

Tatum and Lighthizer, for appellant.

CURRIER, Judge, delivered the opinion of the court.

This is a replevin suit brought by the plaintiffs to recover possession of certain personal chattels which the defendant, as sheriff, had seized upon certain writs of attachment against the firm of A. Chouteau, Paul & Co., and as the property of that firm. The

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controversy respects the title to the property. The plaintiffs claim it as theirs, while the defendant, by his answer, asserts title in Chouteau, Paul & Co.

The firm of Chouteau, Paul & Co. was of short duration. It was organized in the summer of 1868. Soon after its organization, time purchases were made to a considerable amount, and the firm went to pieces in about sixty days from the date of its formation. These facts do not seem to be in dispute, and they are adapted to produce the impression that the firm of Chouteau, Paul & Co. was a fraud from the beginning. It was in evidence that Paul, as representing the firm, made purchases from the plaintiffs, including the goods in controversy, to the amount of some \$4,500, buying on time and representing, as an inducement to credit, that his firm had a capital of \$50,000; that \$25,000 of this sum was in cash and in his possession. Upon the strength of these and other assuring representations, the plaintiffs, as the evidence tends to show, made sales to Paul's firm on time, including in these sales the goods sought to be recovered in this action. Crowley, one of the firm, testified that he acted as the firm's book-keeper and cashier; that he put in as capital \$800, and that he knew of no other firm capital actually brought into the concern. It was also in evidence that the plaintiffs gave both Paul and Crowley notice of a rescission of the sales, and that the rescission was assented to by both of them, and prior to the attachments. The defendant objected to the evidence showing Paul's representations, and the objection is insisted upon here. It was clearly competent for the plaintiffs to show that Paul & Co. obtained the goods fraudulently, and it was equally competent for them to prove Paul's representations as part of the evidence going to establish the fact of fraud. The objection was properly overruled. Crowley's testimony in relation to the firm capital was also objected to, but the objection is without force. It had a tendency to establish the falsity of Paul's representations, as showing a state of facts at variance with those representations. I see no objection to the evidence employed to establish the fact of a rescission of the sale. In the progress of the trial the defendants offered to show that Paul & Co. had pledged the goods

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sued for, while yet in their possession, as security to a third party for borrowed money. The evidence was excluded, and the action of the court in that matter is complained of. The evidence was properly excluded, since it was directed to no issue raised by the pleadings.

The defendant admits the taking of the goods, and then seeks to justify the taking upon the ground that the goods seized were Paul & Co.'s, and that he took them as sheriff in virtue of the attachments against that firm. He distinctly avers title, not in a third party, but in Paul & Co., and rests his defense upon that averment.

The controversy as to the title was between the title claimed by the plaintiffs and the alleged title of Paul & Co., and not between the plaintiffs' title and the title of some third party not known to the pleadings. Under the pleadings the contest as to title was confined to the alleged title of the plaintiffs on the one hand, and the alleged title of Paul & Co. on the other. These two titles were brought in competition. It can not be supposed that either party made a preparation to defend against the title in some third party, whose relation to the subject of the controversy was ignored by the pleadings.

The instructions were well enough. I see no sufficient occasion for a review of them in detail. The evidence was sufficient to carry the case to the jury, and it well warranted a verdict for the plaintiffs. (See *Fox v. Webster*, 46 Mo. 181.)

The judgment will be affirmed. The other judges concur.

JOSEPH UHRIG, Appellant, v. THE CITY OF ST. LOUIS,
Respondent.

1. *Injunction, assessment of damages on dissolution of—City of St. Louis, counsel for.*—The damages to be assessed upon the dissolution of an injunction (Wagn. Stat. 1030, § 13) are what the defendant has actually suffered. And in the assessment of damages on the dissolution of an injunction against the city of St. Louis, it appearing that the city counselor received no special fee for defending the injunction suit, *held*, that a fee for such defense could not be taxed as damages.

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The plaintiff obtained an injunction against the city in a controversy which came before this court at its October Term, 1869, and is reported in 44 Mo. 458. After the decision here reversing the decree and dismissing the bill, the city claiming an attorney's fee for defending the injunction, filed a motion to assess the same against the appellants as damages upon the injunction bond. No other damages were claimed. The motion was submitted to the court below on an agreement of facts, from which it appears that defendant employed no special counsel in the cause, but that the cause was defended by the city counselor, the law officer of the city, who receives a stated salary annually for all the business he does for the city.

Kehr, for appellant.

Reber, City Counselor, for respondent.

BLISS, Judge, delivered the opinion of the court.

Upon dissolution of an injunction the statute provides that "the damages shall be assessed," etc. These damages are what the defendant actually suffered. In this case no damages at all have been suffered in consequence of injunction, therefore no damages should have been assessed.

It has been customary to allow counsel fees as part of the damages, but in this case it is admitted that no counsel fees were paid, and I know of no rule for ascertaining what proportion of the city attorney's salary should be charged.

The plaintiff felt aggrieved at an assessment upon his property, and enjoined it until its legality could be tested. The case was decided against him, he pays the costs and his own counsel fees; the city suffers no loss whatever, and should be satisfied without inflicting an arbitrary penalty upon him.

The other judges concurring, the judgment will be reversed.

STATE OF MISSOURI, Appellant, v. ADOLPH E. KROEGER,
Respondent.

1. *Practice, criminal — Indictment — Larceny — Checks and coin, description of, what insufficient.* — An indictment for larceny, which described the property stolen as "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars; five thousand dollars in money, of the value of five thousand dollars," should be held insufficient on demurrer.

Some further matter of description should be embodied so as to inform defendant of the specific check intended. Section 31 of the act in reference to practice in criminal cases (Wagn. Stat. 1091-2) does not include checks. And under that section, where coin of the United States is referred to, the simple designation of it as money, without describing it as money made or issued by virtue of any law of the United States, is too indefinite.

Appeal from St. Louis Criminal Court.

Chas. P. Johnson, Circuit Attorney, and Cline, Jamison & Day, for appellant.

Lackland, Martin & Lackland, and Allen, for respondent.

The indictment in this case is insufficient at common law because it does not sufficiently describe the check or money alleged to have been stolen. (People v. Ball, 14 Cal. 101; State v. Langbottom, 11 Humph. 39; Rhodus v. Commonwealth, 2 Duvall, Ky., 159; Stewart v. Commonwealth, 4 Serg. & R. 194; Dame-wood v. State, 1 How., Miss., 262; Spangler v. Commonwealth, 3 Binn. 533; State v. Bond, 8 Clark, Iowa, 540; State v. Morey, 2 Wis. 494.)

WAGNER, Judge, delivered the opinion of the court.

The court sustained a demurrer to the indictment in this case, and therefore the only question is whether the indictment contained sufficient allegations to put the accused upon trial. There is but one count, and it is therein alleged that the defendant, on the 10th day of December, 1869, "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars; five thousand dollars in money, of the value of five thousand dollars, all of the property of, etc., * * * feloniously did

then and there steal, take and carry away," etc. At common law an indictment for larceny should describe the money as so many pieces of the current gold or silver coin of the country, of a particular denomination, or other species of money should be specified according to the facts. But our statute regulating criminal practice has done away with much of the nicety and particularity required by the common-law procedure, though I apprehend that it is still necessary to set forth the substantial facts, so that the accused shall be fairly apprised of what he is to meet and defend against.

The act in reference to practice in criminal cases provides that "in every indictment for forging, uttering, stealing, embezzling, destroying or concealing, or for obtaining by color of any false token, writing, or false pretenses, any instrument or property, it shall be sufficient to describe such instrument or property by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* thereof, or otherwise describing the same or the value thereof." (Wagn. Stat. 1091, § 28.) Whilst this section renders it unnecessary to set out the instrument *in hæc verba*, or to give a particular and circumstantial description of it, it can not be supposed that in its enactment the Legislature intended to abrogate and do away with the fundamental principle that in criminal prosecutions the accused has the right to demand the nature and cause of the accusation. To accuse him of the stealing of a check is not sufficiently definite; some further matter of description should be embodied, so as to inform him of the specific check intended.

The thirty-first section of the same chapter in the statute declares that "in every indictment in which it shall be necessary to make any averment as to any money or any note being or purporting to be made or issued by any bank incorporated by law, or made or issued by virtue of any law of the United States, it shall be sufficient to describe such money or note simply as money, without specifying any particular coin or note; and such allegation shall be sustained by proof of any amount of coin, or of any such note, although the particular species of coin of which such

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amount was composed or the particular nature of such note shall not be proved."

This section has reference to notes being or purporting to be made or issued by a bank incorporated by law, and notes or coin being or purporting to be issued by virtue of a law of the United States. It embraces these and no more, and does not include checks at all. The section, though somewhat obscure on account of its brevity, is yet sufficiently clear and patent. It embraces two classes, each distinct. Where coin of the United States is referred to it is sufficient to designate it as money made or issued by virtue of a law of the United States. So a note made or issued by an incorporated bank may be described as money of the institution or corporate body, without showing of what amount it was composed or its particular nature. But the simple designation of money, without any reference to its character, is, I think, too indefinite.

Wherefore, with the concurrence of the other judges, the judgment will be affirmed.

JOHN MAGWIRE, Respondent, v. JOHN RIGGIN, Appellant.

1. Magwire v. Riggin, 44 Mo. 512, affirmed.

Appeal from St. Louis Circuit Court.

Harding & Crane, for respondent.

Glover & Shepley, and *Garesche & Mead*, for appellants.

BLISS, Judge, delivered the opinion of the court.

This cause has once been before us, and is reported in 44 Mo. 512. It was remanded and a new trial had, and a judgment recovered at Special Term, which was affirmed at General Term. No new facts are developed and no new questions raised.

The other judges concurring, the judgment will be affirmed.

JOHN H. MCCOURTNEY AND MARGARET P. MCCOURTNEY, HIS
WIFE, Appellants, v. GOTTLIEB MATHES, Respondent.

1. *Wills — Act of 1825, child not mentioned, can not take child's share unless forgotten.*— Under the act of 1825 touching wills (R. C. 1825, p. 795), a child not mentioned in a will is not entitled to a child's share in the inheritance, under the general law of descents and distributions, unless it is manifest from the will that the child was forgotten, and so unintentionally omitted.

Appeal from St. Louis Circuit Court.

Bakewell & Farish, for appellants.

Plaintiff, Margaret, was not named or provided for in her father's will; he therefore died intestate as to her. (See section 20 of act respecting wills, laws of 1825; *Block v. Block*, 3 Mo. 408; *Beck v. Metz*, 25 Mo. 71; *Bradley v. Bradley*, 24 Mo. 319; *Hockensmith v. Slusher*, 26 Mo. 237; *Hargadine v. Pulte*, 27 Mo. 423.)

Bland & McElheny, for respondent.

The appellants objected below that the will is invalid as to the children, on the ground that no provision was made for them, resting the objection on the statute of 1825 and the present statute. It is well settled that the object of the statute is not to compel parents to make testamentary provision for children, but to prevent the consequences of forgetfulness — of oversight. If any mention is made of the children, therefore, showing that they were not forgotten, the object of the statute is fulfilled, and the testator is not intestate as to a child or children so remembered, although no beneficial provision be made for them. (*Block v. Block et al.*, 3 Mo. 407; *Hockensmith v. Slusher*, 26 Mo. 237.) The will provides that the widow "shall have the management and education of the children." Thus the children were clearly brought to his recollection. It was contended that though the words "their children" in the will necessarily imply a recollection of "children," they are not distributive in their character, and do not imply a recollection of each child, and that the

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plaintiff here, Mrs. McCourtney, might have been forgotten. There is no foundation for the distinction. The words are inclusive, and comprehend all and every. If anything was to go to "their children," it must go alike to each and all. If they are made the subject of the mother's care and management, they alike, each and all, are subject to that care and management. This is undoubtedly so upon the plainest construction of the language. If a doubt could exist on this point it must be set at rest by the reasoning of Judge Richardson in *Hockensmith v. Slusher*, where he says: "Whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator, and was not forgotten or unintentionally omitted. Thus it has been decided that by the mention of a daughter, though dead at the time of the making of a will, it will be inferred her children were not forgotten. The mention of grandchildren will exclude the parent. Naming a son-in-law is sufficient to show that the daughter was brought to the recollection of the testator. And naming two grandchildren will indicate that their brothers and sister, not named, were intentionally omitted," citing 17 Mo. 408; 2 Mass. 570; 14 Mass. 359; 2 N. H. 499.

BLISS, Judge, delivered the opinion of the court.

This was an action of ejectment, both parties claiming under James Evoy, the plaintiff by descent and the defendant by purchase. The plaintiff, Mrs. McCourtney, was the child of said Evoy, and not having been provided for, as is claimed, in her father's will, sues for a child's share. Her father, the said James Evoy, died in 1830, leaving Bridget, his wife, and five children, having duly made a will containing the following provision: "Also, I give and bequeath to my beloved wife, Bridget, the sole and entire possession and disposal and management of all my real and personal estate, also the sole and entire management and education of my children; and that she shall have the management, distribution and disposal of everything as completely, according to law, as I myself now have; during her widow-

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hood. But in case she should change her mind and marry, my will is that the estate in her possession at the time shall be disposed of according to law among my surviving heirs." The widow never married, but in 1855, two of the children joining with her in the deed, she conveyed the land in controversy to John Evoy, through whom the defendant claims title. The validity of the will as against the plaintiff, Mrs. McCartney, must first be considered; and if we find her to have been sufficiently provided for, it will be unnecessary to consider the other questions presented by counsel. This will was executed and proved under the law of 1825, which provided in substance that if any person shall make his last will and testament, and die leaving a child not provided for in such will, every such testator, so far as shall regard such child, shall be deemed to die intestate, etc. (R. C. 1825, p. 795.)

This provision underwent a thorough examination in *Block v. Block*, 3 Mo. 594, and received a construction that has ever since been adhered to. In that case one of the children was expressly excluded from any share in the estate, which was all given by the testator to his wife and the other children. It was contended that, in order to make a provision for a child, the testator should make a beneficial devise or legacy, and that to mention the name of a child and to declare that such child shall have nothing is no provision. But the court held that the intention and meaning of the act was that when a child is forgotten then he shall have a share, but when he is mentioned in the will and excluded, that is a provision within the intent of the act. Judge Tomkins dissented, and the next Legislature, to make the meaning unequivocal and conform to the opinion of the majority of the court, changed the act so as to provide for intestacy in favor of the child if he or she is "not named or provided for." Under the doctrine of *Block v. Block* this addition does not change the meaning of the act, and the decisions made by this court since that case was decided will apply as well to the act of 1825 as to the one now in force. The tendency where the common law prevails is to give the ancestor complete control over his estate, and is strongly manifest in the interpretation given this act, as well

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as to similar acts in other States. A provision, apparently designed to protect a child from being totally disinherited, is construed to mean only that the testator must remember that he has such a child. Where the civil law prevails such a provision would hardly have received such a construction, and it may well be doubted whether the restrictions of that enlightened code upon the power of the ancestor to disinherit his children are not more consonant to reason, more in accordance with the law of nature, than the freedom in that regard given by our system.

In commenting upon the provision in its present form, Judge Richardson, in *Hockensmith v. Slusher*, 26 Mo. 237, says: "This provision of the statute has been several times before this court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when the child, or the descendant of such child, is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten." In that case a bequest had been made to a son-in-law without naming his relation, and, upon application of the daughter for a child's share, the court held that the bequest must have been given to her husband because he was such, and the daughter, though not named or provided for, could not have been forgotten. In *Guitar v. Gordon*, 17 Mo. 408, the testator named his daughter, who was then dead, but did not name her children. The court held it a sufficient provision for his said grandchildren, as they were represented by their mother, who was in his mind, though dead. In *Beck v. Metz*, 25 Mo. 70, the testator left it "entirely to the will and judgment of my wife, Catharine, how and in what manner she thinks proper to dispose of the estate, as well as with reference to our child or children as with reference," etc. He left but one child, and the court held that she was not forgotten. On the other hand, in *Bradley v. Bradley*, 24 Mo. 311, and in *Hargadine v. Pulte*, 27 Mo. 423, it was found that no allusion was made to the children, and as to them an intestacy was declared. Admit, for the purpose of considering this question, that in the case at bar the form of the devise is such as to

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give the property itself, rather than a trust, to the testator's widow, we are to consider whether, upon the construction given the statutes in the cases above cited, Mrs. McCourtney was provided for in her father's will, or whether she was unknown or her existence forgotten by him at the time of its execution. It is plain that she must have been in his mind. There are two allusions by the testator to his children: one in giving to his widow their management and education, and one in giving a remainder to his heirs, contingent upon her marriage. They were all remembered or were all forgotten; and while he remembered them collectively, can it be said that he had forgotten them all individually? The object of the statute was to guard the testator against the effect of a mistake in providing for some of his children to the exclusion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were so forgotten. In speaking of his children or heirs, had the testator named some of them, with no allusion to the plaintiff, we might then assume that she was forgotten; but where all are remembered collectively and equally provided for, with nothing to indicate that one was more in his memory than another, we must assume that each one was remembered and provided for.

The other judges concurring, the judgment will be affirmed.

CONDE L. BENOIST, Respondent, v. JAMES MURRIN *et al.*,
Appellants.

1. *Lands and land titles — Quieting of titles, action for — Dower, unassigned — Adverse claim — Limitation, act of.* — An unassigned dower interest in land is neither a title nor an estate in the scientific sense of those terms, but it is an adverse "claim" which the holder may be called upon to defend under the statute relating to the quieting of titles (Wagn. Stat. 1022, § 53.) And a judgment in such a proceeding would bar the right of dower. And suit to compel the claimant of a dower interest to come in and defend her rights is proper, notwithstanding that it might restrict the time otherwise given her, under the statute of limitations, within which to test her claim of dower.

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*Appeal from St. Louis Circuit Court.**Casselberry, for appellants.*

The wife, before assignment of dower, has no right in her husband's land. Her right, until dower is assigned, is a mere chose in action, and therefore not such an estate in land as is contemplated by the statute for quieting titles. (McClannahan v. Porter, 10 Mo. 751; 4 Kent's Com. 61-2; Johnson v. Shields, 32 Me. 424; 1 Washb. Real Prop. 251-3.) Until dower is assigned the widow has no right of entry (1 Washb. Real Prop. 253), and therefore has no such right as will enable her to maintain ejectment or partition. (Pringle v. Grew, 5 Serg. & R. 536; Doe v. Nutt, 2 Car. & P. 430; Bradshaw v. Callaghan, 5 Johns. 80; Coles v. Coles, 15 Johns. 319.)

Dryden & Dryden, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding under the statute (2 Wagn. Stat. 1022, § 53), instituted for the purpose of quieting the plaintiff's title. The defendants are summoned into court to show cause, if any they have, why they should not be required to bring an action to try their alleged title to the premises described in the petition.

Two of the defendants, Mr. and Mrs. Murrin, come in and show by their answer, in substance, that Mrs. Murrin was entitled to dower in said premises as the former wife and widow of the late Louis A. Benoist; that she has never either asserted or relinquished such alleged right, nor as yet made up her mind what to do in respect to it; and that she wishes to be left to the influence of "future results and events" in the determination of her action on that subject. The answer was demurred to and held insufficient. No further answer being filed, judgment was taken against the defendants by default. The defendants bring the cause here by appeal.

The judgment is sought to be reversed on various grounds, but chiefly for the reason that the dower interest set up in the answer is not, as the defendants insist, a "claim adverse" to the plain-

tiff's title, within the meaning of the statute under which this suit is prosecuted. The first question, therefore, respects the construction of the statute on that subject.

It must be admitted that the unassigned dower interest set out in the answer is neither a title nor an estate in the scientific sense of these terms. (1 Washb. 251-2). But the conflicting interest referred to in the statutes is spoken of not only as a "title," but also as a "right," a "claim," as though every right, title and claim in conflict with the petitioner's title was intended to be included, whether the right or claim amounted to a technical title or not. The language of the statute is undoubtedly broad enough to embrace the dower interest mentioned in the defendant's answer. That at least is a claim, and a claim in opposition to the title of the petitioner. All that a petitioner is required to aver on this subject in bringing his suit is that he is creditably informed and believes that the defendant makes "some claim adverse" to the petitioner's title. If it turns out that the defendant is making some claim adverse to the petitioner's, is not the petitioner's case made out in respect to this point? Then the judgment provided for, in case the defendant makes default or disobeys the order of the court, is that the defendant be "forever debarred and estopped from having or claiming any right or title adverse" to the petitioner. Certainly such a judgment would bar the right of dower.

It is quite true that an unassigned right of dower will not sustain an action of ejectment, but Mrs. Murrin may nevertheless sue for her dower. (1 Wagn. Stat. 542, § 22.) Her remedy as to her dower is present and complete. Of course, the adverse claim is to be pursued by an action appropriate to the nature of the right or claim to be asserted.

But it is suggested that Mrs. Murrin may pursue her remedy at any time within the period fixed by the statute of limitations applicable to such a case, and that a compulsory suit at this time would limit and restrict her rights under the act of limitations. That may be so. One of the objects of the statute under consideration is to hasten litigation, and thus secure the adjustment of controversies without waiting the slow movement of the statute

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of limitations. If the objection under consideration is of force here, it would be of equal force in any case where a compulsory suit would proceed in advance of the running of the statute of limitations.

Again, it is objected that Mrs. Murrin, as shown by the pleadings, is now a *femme covert*, and so under disability and incapable of suing alone, and that her husband might refuse to join in the appropriate action to vindicate the rights of his wife. It will be time to consider that difficulty when it arises. This is a mere preliminary proceeding, and it is not considered necessary to anticipate a difficulty that may never arise.

The defendant Wilson was joined in the defense because of his relation to Mrs. Murrin as her trustee. He was dismissed from the suit at General Term, but neither party took exception to the order of dismissal, and the objections now urged to the action of the court on that subject will not be considered.

Judgment affirmed. The other judges concur.

HICKMAN N. ROBB, Appellant, v. CHICAGO AND ALTON RAILROAD COMPANY, Respondent.

1. *Damages* — *Illinois railroads, whose chief place of business is not in St. Louis — Jurisdiction of courts of this State.* — In suit for damages against the Chicago, Alton and St. Louis Railroad Company, the proof showed that by defendant's charter its "chief office" was to be held in Chicago; that the company had an office in the city of St. Louis for the sale of tickets and for receiving and handling freight; but the general freight office, the offices of the president and secretary and the board of directors, were in Chicago. *Held*, that under the statute concerning corporations (Wagn. Stat. 292, § 19) the courts of this State had no jurisdiction.

Where the road terminates opposite the city of St. Louis, and has its chief office for the transaction of business in St. Louis, then the law regards it as a domestic corporation and amenable to the jurisdiction of our courts by the ordinary process of summons.

Error to St. Louis Circuit Court.

T. S. Espy, for appellant.

Dryden, Lindley & Dryden, for respondent.

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WAGNER, Judge, delivered the opinion of the court.

This was an action brought in the St. Louis Circuit Court to recover damages for the negligently running of the defendant's engine and cars against the wagon and horses of the plaintiff at a public road-crossing in the State of Illinois.

The petition alleged that the defendant was an incorporated company duly organized under an act of the Legislature of the State of Illinois, and that it operated a railroad terminating opposite the city of St. Louis, and that its chief office or place of business was in the city of St. Louis.

The answer was in effect a plea to the jurisdiction of the court, and put in issue the allegation as to the location of the defendant's chief office or place of business.

On the trial the plaintiff read in evidence the defendant's charter, the fourth section of which provides that "the chief office of said corporation shall be in the city of Chicago." Evidence was also given showing that although the defendant had an office in St. Louis for the sale of tickets and for receiving and handling freights, yet the general freight office, the offices of president and secretary and the board of directors, were at Chicago. Upon these facts the court dismissed the case for want of jurisdiction, and the plaintiff appealed to this court. There is but one question to be determined, and that is the jurisdiction of the court.

The statute in reference to corporations provides that "any corporation incorporated by any other State or country, and having property in this State, shall be liable to be sued, and the property of the same shall be subject to attachment in the same manner as individuals, residents of other States or countries and having property, are now liable to be sued and their property subject to be attached; provided that all railroad companies who own and operate roads terminating opposite the city of St. Louis, and whose chief office or place of business is in the city of St. Louis, shall be sued in the same manner, and no other, that railroad companies chartered by the laws of this State are sued." (1 Wagn. Stat. 292, § 19.) The same provision, as to bringing suits against railroad companies owning or operating roads ter-

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minating opposite the city of St. Louis, is made in the practice act (2 Wagn. Stat. 1006, § 2).

The jurisdiction is everywhere made to depend on the fact that the corporation has its chief office or place of business located in St. Louis. Where the chief office or place of business is kept in the city of St. Louis, then it may be proceeded against and sued and served with process in the same manner as home companies chartered by this State. But where the chief office or place of business is not situated within the city of St. Louis, then the only mode of proceeding against it is by the process of attachment.

In *Farnsworth v. Terre Haute, Alton & St. Louis R.R. Co.*, 29 Mo. 75, Judge Napton, in construing this statute, said: "When the foreign corporation has located here and has its chief office or place of business here, it seems no longer to be regarded as a foreign corporation. It may be sued as an individual resident here. The president, secretary, etc., are of course here, or such officers as, under our statute, would enable a suit to be brought and service to be had; and there is no necessity for giving the extraordinary process of attachment against it, any more than against a domestic corporation whose chief office is here. Having its chief office here, it ceases to be, for all the purposes of this law, a foreign corporation."

Again, in another case, where jurisdiction was assumed over a corporation chartered and created by the laws of another State, Judge Holmes, in delivering the opinion of this court, said: "The facts stated show that the city of St. Louis was the domicile and home port of these ferry-boats; that the owner, though a corporation created in another State, had a principal office and place of business in this city, and was a resident here within the meaning of our law; that the chief officers of the company resided here and were the acting managers for the owner, and that the boats plied from and to their home port, and were subject to the immediate control of the officers and agents residing here." (*City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580.)

The statute, we think, is plain, and there can be no doubt as to its meaning, but the above citations have been made to show the uniform construction placed upon it by this court. Where the

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road terminates opposite the city of St. Louis, and it has its chief office for the transaction of business here, then the law regards it as a domestic corporation and amenable to the jurisdiction of our courts by the ordinary process of summons. But all the evidence in this case shows that the defendant's chief office and place of business is in Chicago, and therefore we can not subject them to this proceeding.

Judgment affirmed. The other judges concur.

PETER SHARKEY, TRUSTEE OF CHARLES AND ALFRED H. SHARKEY,
Defendant in Error, v. JOHN SHARKEY, Plaintiff in Error.

1. *Conveyances — Deeds, absolute, coupled with agreement to convey a mortgage.* — A deed absolute on its face, coupled with an agreement that on payment of a given sum the grantee would convey, is a mortgage.

Error to St. Louis Circuit Court.

H. N. Hart, for defendant in error.

Davis, Bowman & Smith, for plaintiff in error.

BLISS, Judge, delivered the opinion of the court.

This was an injunction against the disposition of certain real estate, and a petition to redeem a mortgage upon it. The petition shows that the plaintiff held the land as trustee with power of sale; that he had executed a deed of trust upon it to secure certain debts; that it was sold under the trust deed and bid in by a friend of plaintiff, who still held it for him, to be conveyed to him upon payment of the debt; that the plaintiff, being unable to pay it, made an arrangement with defendant by which he was to receive a deed of the property from this friend, advance the money to pay the debt, hold it as security for this advance and for certain other indebtedness of the plaintiff to him. Accordingly the defendant received a deed absolute on its face, and gave to plaintiff a written agreement to convey upon payment as above. The petition charges that the defendant has received his pay in full by rents collected and in other ways, and

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asks for an account and reconveyance. The answer admits the main facts, but denies the receipt of the amount charged. An account was taken by a referee, and upon his report the court found that the plaintiff was still owing the defendant some four hundred dollars, and ordered the defendant, upon payment of that sum, to convey the premises to the plaintiff as trustee.

No exceptions are preserved, and we are asked to reverse the judgment because it is not sustained by the pleadings and by the facts found by the court. In order to sustain their view, counsel for defendant treat this agreement between the parties for a redemption of the property as a contract of sale, and claim that it was without consideration, was not mutual, was not fulfilled according to its terms, that time was of the essence of the agreement, etc., etc. But all this has nothing to do with the case. This was a mortgage, and the contract between the parties was a condition of defeasance by a separate instrument. Judge Holmes, in *Copeland v. Yoakum's Adm'r*, 38 Mo. 349, well says: "There can be no question that this absolute deed and the bond or defeasance of the same date, taken together, constitute a mortgage. This is too well settled to require the citation of authorities." Hence this proceeding, instead of being one for specific performance, as defendant claims, was instituted to enforce the plaintiff's equity of redemption, and fully sustains the judgment. It makes no difference that the conveyance to defendant was not directly from the plaintiff. Its object was the same, and the plaintiff's interest was the same.

The other judges concurring, the judgment will be affirmed.

JAMES JUDGE, Respondent, v. HARRIS D. BOOGE, Appellant.

1. *Equity — Decree need not embrace facts found.*—Under the present code it is not required that the facts upon which a decree is based shall be specifically found. In equity the case is now preserved in the same manner as in an action at law, by a bill of exceptions.
2. *Trusts and trustees — Sale of land under deed of trust — Re-sale — Advertisement — Postponement.*—Where a purchaser at a trustee's sale refuses to complete the contract, it would be improper for the trustee to re-sell on the

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same day. His obvious duty would be to re-advertise and sell upon full notice, when the bidding would be open to competition, and a fair price might be obtained.

But a sale of this character must be distinguished from a regularly adjourned sale. The trustee may regularly adjourn a sale to a different time and place when in his discretion, fairly exercised, it shall seem to him necessary in order to obtain a fair auction price for the property. He should always postpone the sale when necessary to obtain a fair price, and should never permit the creditor to force the sale at an inadequate price.

Appeal from Sixth District Court.

Krum & Decker, with whom were *M. L. Gray* and *E. A. Lewis*, for appellant.

I. The decree in this case is erroneous because it does not recite or state the facts on which it is founded or which the court below considered as proved. This is error for which a bill of review would lie. A decree in chancery, without finding the facts that warrant it, is erroneous. (1 Root, 273.) A decree in chancery must find the facts directly and positively. (*Id.* 466, 521; 2 Ch. Cas. 161; 2 Mad. Ch. 453; 1 Harrison's Ch. Prec. 108; 10 Yerg. 41.) A decree must be not only *secundum probata*, but also *secundum allegata*. (5 Mason, 113.) A decree must be sustained by the allegations of the parties as well as by the proofs in the cause, and can not be founded on a fact not put in issue by the pleadings. (10 Wheat. 181; Gregory & Huston v. Powers *et al.*, 3 Litt. 339.)

II. If it is assumed that the plaintiff is in a position to ask to have the trustee's sale set aside, he has failed to show in evidence any facts which affect the validity of the sale in question. That the conveyance of the land in question, by the two deeds of trust, to the trustee, with power to sell for the satisfaction of the debt, etc., is valid, can not be denied. Such conveyances were at all times valid by the English common law. (Powell on Mortg. 13; 2 Sto. Eq., § 1009-24; 4 Kent, 146; 4 How. 553.) A sale under a power is equivalent to a foreclosure in chancery. (10 Johns. 185; 2 Cow. 195; 4 Paige, 526.)

H. C. Lackland, with whom was *F. F. McDearmon*, for respondent.

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I. Connect the inadequacy of consideration with the intermeddling of Booge and Chittenden with the duties of the trustee, with the irregularities of the sale, the two sales on the same day at different times, the false representation of Chittenden to Flournoy, the imprisonment of Judge, and with the other facts too numerous to mention here, and the case shows one of the grossest frauds ever perpetrated. Wherever the least fraud or unfairness appears, the court will always unhesitatingly give relief. The decisions are without number. (Clarkson v. Creeley, 40 Mo. 114; Barnard v. Duncan, 38 Mo. 170; Powers v. Kueekhoff, 41 Mo. 430-1; Rutherford v. Williams, 42 Mo. 19; McNew v. Booth, 42 Mo. 189, 192; Goode v. Comfort, 39 Mo. 327-8; 1 White & Tud. Eq. Cas. 188-9, 206-7, 218-19; Hill on Trust. 522-3, 526, 772; Thornton v. Irwin, 43 Mo. 153; 42 Mo. 551; 35 Mo. 95; 37 Mo. 204; 39 Mo. 71; *id.* 313; 7 Mo. 346; 3 Mo. 413; 22 Mo. 333; 20 Mo. 290; 25 Mo. 309; 23 Mo. 13; 36 Mo. 514; 20 Mo. 294; 11 Mo. 74; 10 Mo. 75; Grumley v. Webb, 44 Mo. 444; Dover v. Kennerly, 38 Mo. 469.)

II. Counsel for defendant argued in the District Court that the decree is defective because it does not find the facts. We deny that it is necessary to find the facts. There is no defect in the decree in this respect. Under the practice act of 1849 it was necessary to find the facts in the decree. (Sess. Acts 1849, p. 90, § 2.) The judgment was the legal conclusion of the facts set out in the finding, and hence the finding had to contain all the facts necessary to sustain the judgment, and in law cases the appellate court had no power to find the facts. Hence, under the practice act of 1849, the judgment had always to contain a finding of the facts necessary to sustain it, otherwise it was reversed. But this was found extremely inconvenient in practice. Since the practice act of 1855, it is not necessary to set out the facts in the body of the judgment. (27 Mo. 161, 227, 230.) The only question is, does the judgment fairly determine the rights of the parties? Is the judgment a just conclusion upon the whole record and evidence in the case? The form is nothing, the conclusion is everything. The same practice in this respect

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is applicable to both law and equity cases. (State *ex rel.* Allen v. St. Louis Circuit Court, 41 Mo. 574, 579 *et seq.*) What is the use of setting out a long string of findings in an equity case, when the appellate court may find some of the facts differently from the lower court, and yet affirm the judgment for a different reason? But if this is a defect, being a merely formal one, it is no ground for reversal, and can be corrected in this court. (Gen. Stat. 1865, p. 548, § 40, p. 670, § 5, p. 671, §§ 19, 20; Sess. Acts 1867, p. 134.) But we insist that the decree does find all the facts, and that, too, in a very clear and explicit manner. It finds the issues upon the pleadings, which are as much a part of the record as the judgment itself. (Gen. Stat. 1865, ch. 169, §§ 1-4.)

WAGNER, Judge, delivered the opinion of the court.

It is insisted by the counsel for the appellant that the decree in this case is erroneous because it does not recite or state the facts on which it is founded or which the court below considered as proved. But under our present code it is not required that the facts upon which the decree is based should be specifically found. Under the practice act of 1849 it was necessary to find the facts. The judgment was the legal conclusion of the facts set out in the finding, and therefore the finding had to contain all the facts necessary to sustain the judgment. But the law, as enacted in 1855, has changed the rule and made it otherwise. (Kurlbaum v. Roepke, 27 Mo. 161; Martin v. Martin, *id.* 227; Brosius v. McGaugh, *id.* 230.) In equity the case is now preserved in the same manner as in an action at law. All the material evidence must be incorporated in the bill of exceptions, for the case is heard in the appellate court upon the pleadings and the evidence, and the whole case will be passed upon in the court of last resort and decided accordingly. (State *ex rel.* Allen v. St. Louis Circuit Court, 41 Mo. 574.)

It is unnecessary to examine the charge made in the bill as to the combination entered into between Booge, the appellant, and Chittenden and Copelin for the purpose of cheating and defrauding Judge, as the allegation was not sufficiently sustained by the

proofs, and it becomes unimportant in view of the subsequent shape given to the case. That Booge purchased the notes and caused the land to be sold with the express purpose of speculating and gaining an unconscionable advantage over Judge, is too clear and transparent to be doubted for a moment. Judge had made his two promissory notes for \$5,000 each, secured by deed of trust on upward of 2,000 acres of very valuable land in St. Charles county. The notes had just matured. They bore no interest, and yet Booge buys them for their full face, and commences proceedings to foreclose the deed of trust at once. His attorney wrote out the advertisement and had it published in a paper without taking time to consult the trustee, and afterward showed it to the trustee and got him to approve and ratify the action taken.

Previous to this time Judge had been arrested by the military authorities of the United States and kept confined in a military prison till long after his property was sold and sacrificed. No effort was made to notify either him or his agent, but he was kept in profound darkness. It is true that Booge had the right to buy the notes, and he had also the right to pursue his remedy and enforce the collection; and if everything was conducted fairly and in pursuance of law, he is entitled to be protected, notwithstanding his motives. For the purpose of deciding this case I shall leave out of view the mass of matter relating to fraud in the transaction, as it may be satisfactorily disposed of without entering into that examination.

When the property was set up for sale it sold in mass without any division, and was struck off to Booge for \$4,000, a sum conclusively shown by the evidence not to be one-twelfth part of its actual value. The bidders then separated and dispersed, and when the trustee proceeded to make out the deed he discovered that the provision in the trust deed had been violated in the sale — that the deed required that the land should be sold in parcels. When the attention of Booge and his attorney was directed to this they refused to complete the purchase, and the trustee then, on the same day, without giving any new notice, re-sold the property. This second sale took place within the hours specified

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in the advertisement, but no person was present at it except the parties immediately interested. Booge again became the purchaser at the same price; there was no competition in the bidding. Although the price paid was grossly inadequate, yet this consideration, unattended with other circumstances, would not be sufficient of itself to authorize a court to set aside the sale or declare the purchaser a trustee for the grantor in the deed. But it is an element which the courts will rigidly scrutinize in connection with other facts. Sales made by trustees being a harsh mode of disposing of the equity of redemption, should be watched by the courts with a jealous eye, and should not be sustained unless conducted in all fairness and integrity. The trustee, in exercising the power, becomes the trustee of the debtor, and is bound to act *bona fide* and adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor. (Goode v. Comfort, 39 Mo. 313.)

That the trustee, in exposing the property to sale a second time, when there was no competition, did not exercise a sound discretion, is apparent. It is doubtful whether he had the power to sell at all under the law; most certainly not under the circumstances of this case.

In the case of Barnard v. Duncan, 38 Mo. 170, Judge Holmes, in writing the opinion of the court, held that where the trustee in a deed of trust with a power of sale at public auction, upon giving notice for a certain number of days, advertises the property and puts it up for sale, and the property is struck off to a bidder, the trustee can not, upon the same day, re-sell the property because the purchaser refuses to complete the contract; that there must be a new publication of notice. The same doctrine is repeated in Dover v. Kennerly, *id.* 469.

Although the facts in the case of Barnard v. Duncan did not require that precise point to be decided, still the mode of proceeding pointed out on a second sale is the only one which can do complete justice and protect the rights of the debtor. Where a re-sale is had upon the same day that the first sale takes place, the time is of course uncertain and depends upon the contingency that the first purchaser will not perfect and execute his contract.

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How are bidders to know that the property will again be re-sold, and at what hour the sale will happen? It can not be expected that they will wait for hours at the place for the happening of an uncertain event. Under such circumstances the obvious duty of the trustee would be, in the exercise of a sound discretion and for the protection of the interest of the debtor, to re-advertise and sell upon full notice, when the bidding would be open to competition and a fair price might be obtained.

It is very questionable whether any proclamation was made in this case notifying the bidders that a re-sale would take place in the event that the purchaser did not comply with the terms. Whilst there is some evidence going to show that such proclamation was made, the evidence is equally explicit on the other side that there was no such proclamation.

M. L. Gray, who was interested in the matter as an attorney adverse to Judge, the respondent, was present, and states that he can not say there was any notice given that there would be a re-sale in the event that the purchaser at the first sale did not execute the terms of the agreement. He had an idea that such notice was given because it was the usual custom, but he can not state positively that there was any such notice or proclamation. Judge Krekel, who was also acting as attorney for Chittenden, who was interested in the transaction with Booge, was present at the first sale by special request of his client, and he says that he thinks he would have recollected the fact if any proclamation had been made concerning a second sale; that he had thought over the matter, and had no recollection whatever of any proclamation being made looking to a second sale on that day in any contingency. The conclusion impressed upon my mind is clear, that although there was something said about a re-sale taking place in the event that the purchaser should make default, as deposed by some of the witnesses, yet the proclamation was made in such a manner that it did not impart general information, and, for the purposes of this case, must be considered as no notice at all. A sale of this character must be distinguished from a regularly adjourned sale. The power of a trustee to sell at public auction after a certain public notice of the time and place of sale includes

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the power regularly to adjourn the sale to a different time and place when in his discretion, fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property. (*Richards v. Holmes*, 18 How. 147.) The trustee should always postpone the sale when necessary to obtain a fair price, and should never permit the creditor to force the sale at an inadequate price.

When this second sale took place, there was nobody present except Booge and those acting with him. Under such circumstances it would have been the plain duty of the trustee to have postponed the sale instead of permitting an absent and imprisoned party's property to be sacrificed. But the fact stares us in the face at every step in this proceeding that the trustee had little or nothing to do with it. He was a mere passive instrument, and allowed Booge to manage and dictate everything that was necessary or requisite to subserve or conduce to his sinister purposes and selfish ends. A court of equity can not be prostituted to sustain such a transaction.

But the appellant further contends that the decree can not be sustained by the law. The respondent voluntarily dismissed the suit as to Copelin on the ground that he was an innocent purchaser under Booge, and Chittenden was released by making a compromise with him. Instead of avoiding the sale *in toto*, as might well have been done, the court simply decreed that Booge should pay over the profits, and allowed him for all his expenditures and commissions besides. This was exceedingly favorable to him, and surely if Judge does not complain he should not be dissatisfied. We do not think that Judge obtained all he is entitled to; but as he seems to acquiesce, we have only to affirm the judgment.

Judgment affirmed. The other judges concur.

The State of Missouri v. Kroeger.

THE STATE OF MISSOURI, Respondent, v. ADOLPH E. KROEGER,
Appellant.

1. *Practice, criminal—Indictment, allegations in—Repugnancy.*—An indictment charged defendant with forging a check "purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis." The check afterward set out showed the signature of "M. E. Susisky, treasurer." *Held*, that the two allegations were not inconsistent with and repugnant to each other. (State v. Finley, 18 Mo. 445.)
2. *Criminal law—St. Louis city treasurer—Blank check, filling out and using for a different purpose from that directed, constitutes forgery.*—The treasurer of the city of St. Louis left with A. certain blank checks, with directions to fill them up to the use of holders of warrants against the city; but A. took one of the checks, inserted the date and amount, and the words "cash or bearer" in place of the words "order of," erased from the printed blank. By whom the words were erased did not appear. A. converted the check to his own private use, by depositing it in bank the same day on his private account, and drawing the money on it for his own use. *Held*, that under the statute law of this State (Wagn. Stat. 470, § 16) he was guilty of forgery in the third degree. As the check had been signed with specific instructions to use it for a certain purpose, A., in thus filling it up for a different purpose, clearly made a false instrument.

Appeal from St. Louis Circuit Court.

The first count of the indictment charged that said Kroeger, "on the eleventh day of December, in the year of our Lord one thousand eight hundred and sixty-nine, at St. Louis, in the county of St. Louis aforesaid, with intent then and there to injure and defraud, did unlawfully and feloniously falsely make, forge and counterfeit, in county and State aforesaid, a check for the payment of money, purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Missouri, in words and figures following:

'OFFICE OF CITY TREASURER,
ST. LOUIS, Dec. 11, 1869.

'No. 148.

'TRADERS' BANK,

'Pay to ~~the order of~~ cash or bearer,

'Six thousand - - - - - Dollars.

'\$6,000.

United States
Internal Revenue
Stamp.
3 Cents.

100 Dollars.

'M. E. SUSISKY,
'Treasurer.'

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With intent then and there to defraud and injure the Traders' Bank, a bank at St. Louis, in the county of St. Louis aforesaid, duly incorporated under and by virtue of the laws of the State of Missouri, out of the sum of six thousand dollars, against the peace and dignity of the State and contrary to the form of the statute in such case made and provided."

The second instruction asked by the defendant, and refused by the court, was as follows:

"2. If the jury find from the evidence that M. E. Susisky signed the paper set out in the indictment, in blank, and delivered the same to defendant alone, or with another, and gave the defendant authority to fill up said paper, and use the same or its proceeds for certain purposes designated by Susisky, and that the defendant, under this authority, filled up the blanks in said paper, then the jury ought to acquit the defendant, even though they may believe that defendant used said paper or its proceeds for a purpose or purposes not designated by said Susisky."

The testimony of Susisky showed that the printed words "the order of" had been struck out by ink lines; that the words and figures "No. 143," and the words and figures "December 11, 1869," "cash or bearer, six thousand dollars," had been inserted.

The third paragraph of the instruction given by the court, of its own motion, was as follows: "If the jury believe, from the evidence in the case, that M. E. Susisky was, on or about the 2d day of December, 1869, treasurer of the city of St. Louis, and that at said time he delivered the check described in the indictment to the defendant, already signed by him, with the name of 'M. E. Susisky, treasurer,' with the date, payee and amount left blank, with authority to fill up and use the same for the use and benefit of the city of St. Louis, and to fill up and use the same for no other purpose; and if you further find from the evidence that the defendant, on or about the 11th day of December, 1869, at St. Louis city and county, feloniously filled up said blanks by inserting 'December 11, 1869,' 'cash or bearer,' 'six thousand,' and '\$6,000,' with intent then and there to use the same for his own use and benefit; and that he did so use

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the same for his own use and benefit, and not for the use and benefit of said city of St. Louis, with intent to defraud and injure as charged, then this constitutes the crime of forgery in the third degree, and so you should find."

Lackland, Martin & Lackland, and Allen, for appellant.

I. As substantially the same questions are raised upon the motion to quash the indictment and the motion in arrest of judgment, they will be considered together. The allegations in the indictment are repugnant to and inconsistent with each other. In the indictment it is averred that the defendant forged a check which purported to be the check of M. E. Susisky, treasurer of the city of St. Louis, and the check set out in the indictment does not so purport. As to the meaning of the word "purport," see *Downing v. The State*, 4 Mo. 572; *Bright et al. v. White*, 8 Mo. 421; *State v. Page & Bacon*, 19 Mo. 213; 2 *Russell on Crimes*, 380; *Commonwealth v. Kearns*, 1 Va. Cases, 109; *Arch. Crim. Pl.*, 5th ed., 47; *Rex v. Reading*, 1 East, 180; 2 *Leach, C. C.*, 590; *Rex v. Gilchrist*, 2 Leach, 657; *Rex v. Edsall*, *id.* 662; *State v. Smith*, 31 Mo. 120; *State v. Waters*, 3 *Brevard*, 507; *State v. Shawley*, 3 *Haywood, Tenn.*, 256. It is true, the instrument set out in the indictment has on its caption the words "office of city treasurer," but there is no indication of the office of city treasurer of the city of St. Louis, and the instrument does not so purport. Again, this caption forms no part of the check. It is in nowise necessary to make it a complete instrument. Any one could date a check at the city treasurer's office. It is also true that the word "treasurer" follows Susisky's name on the check, but this no more purports to be his act as "treasurer of the city of St. Louis" than it does as treasurer of any other city, or corporation, or voluntary society.

II. The indictment is insufficient because the offense is not averred in the language of the statute, to-wit: that it does not allege that the instrument set out was, or purported to be, the act of another, by which any pecuniary demand or obligation was, or purported to be, transferred, created, increased, discharged or

diminished, or by which any rights or property whatsoever was, or purported to be, transferred, conveyed, discharged, increased or in any manner affected. (Gen. Stat. 1865, ch. 202, p. 795, § 16.) It is true, the case of *The State v. Fenly*, 18 Mo. 445, decides this point against the defendant, and, as an authority, chiefly relies upon the case of *The People v. Rynders*, 12 Wend. 425. Both of these cases were decided, however, by only a majority of the court, and they must be admitted to be a departure from the rules of the criminal law which require the indictment to follow the language of the statute upon which it is drawn, descriptive of the offense.

III. Where an intent to defraud a particular person is averred it must be shown either, first, that the instrument, if genuine, would be the obligation of such person; or, second, that the defendant passed, or attempted to pass, the instrument to such person, as true, with knowledge of its real character. (*United States v. Shelmire*, 1 Bald. 370.) There is no presumption of law arising upon the face of the check, that defendant intended to defraud the Traders' Bank; because, if it were genuine, it would not be the contract of that bank. (2 Pars. Bills and Notes, 61, note.) And the proof utterly fails to show any such intention to defraud. The defendant never presented the check, for any purpose, to the Traders' Bank; but, on the contrary, presented it to the First National Bank, where it was deposited to his credit.

The third paragraph of the charge or instruction given by the court presents, in substance, to the jury this proposition, to-wit: that if Susisky signed the check in blank, and delivered it to defendant with authority for him to fill up and use it for the benefit of the city of St. Louis, and that defendant, under these circumstances, filled up and used the check for his own use, with the intent to defraud, etc., then the jury should find him guilty of forgery in the third degree. We deny that this instruction given by the court correctly presents the law applicable to the facts. On the trial before the Criminal Court, the counsel for the State relied upon three cases decided in England, in which the court held that where checks signed in blank were delivered

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to the defendants, with authority to fill them up with certain definite sums, and they were filled up with greater sums than those named, and the excess converted to the use of the parties filling them up, they were guilty of forgery. (*Regina v. Wilson*, 2 Car. & Kerr, 527; *Rex v. Minterhart*, 2 Brit. C. C. 486; 7 Car. & Payne, 652; *Regina v. Bateman*, 1 Cox C. C. 186.) In regard to these cases we have to say that they are not in point. The questions in them do not arise in this case. The doctrine of these cases has been decided by this court, in three cases, to be otherwise; in which it has been held by this court that where instruments signed in blank were delivered to third parties, with authority to fill them up with certain specified sums, the fact that they were filled for amounts greater than those limited did not constitute forgery. (*Tumelty v. Bank of Missouri*, 13 Mo. 276; *Farmer's Bank v. Gertin et al.*, 34 Mo. 119-22; *Henderson v. Bendervoort et al.*, 39 Mo. 373; *Spitler v. James*, 9 Am. Law Reg., N. S., 605.) On same point see *Trustees of Iowa College v. Hill*, 1 Am. Law Reg., N. S., 744, note; *State v. Flanders*, 38 N. H. 324; *Commonwealth v. Sankey*, 22 Penn. 390; *Hill v. Tennessee*, 1 Yerg. 76. The last three cases would seem to establish the principle that if Kroeger obtained the check in question, signed in blank by Susisky, under a false and fraudulent representation or pretense that he would fill up and use it for the benefit of the city of St. Louis, and that if he afterward filled up and converted the check to his own use, it would not be forgery. It is true that in all the text-writers, from Coke and Hawkins down to Wharton, it is laid down that if one be employed to write a will, with instructions as to what it shall contain, and he write the will materially different from the instructions, and fraudulently procure the testator to execute it, under the belief that it is drawn agreeably to his instructions, it will constitute forgery. But we submit that this is a legal heresy; that the doctrine of the text-writers on this point is not supported by the cases referred to by them, and that it has been denied on principle by all the subsequent cases, with one single exception. This erroneous doctrine is stated in 3 Inst. 170; 2 East, P. C., 855; 1 Hawk. P. C., ch. 20, §§ 2-6; Bacon's

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Abr., tit. Forgery A; 2 Russell's Crim. Law, 318-22, and others of a more modern date. The texts cite and are founded upon Comb's case in Noy's Reports, 101, and also reported in Moore's Reports, 769. These texts are opposed by the case of Sir John Marvin's will (3 Deyer, 288), which is directly in point, and opposed in principle by the cases of Regina v. Collins, 2 Moody & R. 461, and Regina v. Chadwick, *id.* 546, decided in England, besides the cases cited herein decided in the United States. There is also one exception to the uniform decisions in the United States in the same direction. We allude to the case of The State v. Shurtliff, 18 Me. 371. Weston, C. J., in delivering the opinion, cites 2 Russell, 317, which, in turn, refers to 2 East, 855; Noy, 101; Moore, 759 (the old Star Chamber case); 3 Inst. 170; Hawk. ch. 21; Bacon's Abr., tit. Forgery A. And thus the same ancient chronic errors are marshaled without any allusion to the modern cases to which we have above referred. We would refer the court to the opinion of Judge Agnew, of the Quarter Sessions, in the case of Commonwealth v. Sankey, *supra*, with the opinion of the Supreme Court by Black, C. J., in the same case, in which the opinion of Agnew, J., is fully adopted, to which opinions we are indebted for some of the views here expressed. The only case decided in America or England we have been able to find, which appears to cover the principles involved in this case closely, is that of Putnam *et al.* v. Sullivan *et al.*, 4 Mass. 53. In the case at bar, the check was signed and delivered by Susisky to Kroeger in blank, accompanied with a trust or confidence, in the language of Parsons, C. J., in the case referred to. And this is the key which unlocks this transaction, and makes the proposition of law involved in it of easy solution. If the check was delivered by Susisky to Kroeger in blank, coupled with a trust or confidence, and that trust or confidence embraced authority for Kroeger to fill it up for any purpose, then there can be no forgery in the case, because then the forgery would be predicated solely upon a mere breach of trust or confidence.

The error in the instruction of the Criminal Court, of which we here complain, is apparent in this: that it makes the fraudulent

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use—and that alone, it may be—of a clearly granted power to fill up a check, a forgery. Now it is perfectly clear, and can not be denied, that the crime of forgery consists of two elements, to-wit: first, a false making; and, second, a fraudulent intent. And the fatal error in this instruction is that it entirely ignores the false making, and tells the jury that although Kroeger may have had power to fill up the check, yet if he did so with a fraudulent intent he is guilty of forgery. Now, if Kroeger had authority to fill up the check, as we have seen, there was no false making, and consequently that element necessary to constitute the crime of forgery is wanting. We are unable to see any escape from this conclusion.

In conclusion, we have only to add on this point that if it be true that Kroeger had authority to act as the agent of Susisky in filling up the check, then it ought to be regarded as having been filled up and made a complete instrument by Susisky himself, in his own proper person; and therefore the transaction disclosed in this case, so far as legal principles are concerned, ought to be viewed in precisely the same light as if Susisky had filled up this check, and thereby had made it a complete and genuine instrument himself personally, and had delivered it to Kroeger with instructions for him to apply it or its proceeds to a particular named purpose, and Kroeger, in violation of such instructions, had converted the check or its proceeds to his own use. This would certainly be a fraud and a wrong on the part of Kroeger, unless he could justify his action; but it must be admitted that a fraud or wrong is not necessarily a forgery, and it is just as certain there would be no forgery in this transaction because there would be no false making. And this, as it seems to us, is the only logical or legal conclusion which can be reached on this point.

Cline, Jamison & Day, with whom was *Chas. P. Johnson*, Circuit Attorney, for respondent.

The check in evidence embraces all the elements contained in the clause of the statute creating the forgery attempted to be charged. (*State v. Fenly*, 18 Mo. 445; *Gen. Stat.* 1865, ch.

211, p. 842, § 828.) The indictment not only conforms to the requirements of our statute, but goes far beyond what would be a good and sufficient count under it. It describes the forged instrument by the name by which it is usually known, and sets it out in its words and figures.

It has been urged that the indictment should aver that M. E. Susisky was treasurer of the city of St. Louis. But at best such averment could only be *descriptio personæ*, as the offense would be complete under our statute if there was no such person as M. E. Susisky, or the corporation of the city of St. Louis, or the office of treasurer of the city of St. Louis, in existence. (Gen. Stat. 1865, ch. 202, § 26.)

This is no case of breach of trust. If he had power to make an instrument and utter it, it was simply to fill up the blanks with the name of the holder of a warrant, and fill into the check the amount of the warrant and deliver it in satisfaction, and take up the warrant as a voucher for the check. If he had any authority at all, this was its extent; and if he had this power, he never exercised it in a single instance. All the checks that were used for the city of St. Louis in the absence of M. E. Susisky, its treasurer, were filled up by Mr. Dougherty, the deputy treasurer, who had power of attorney from Susisky to conduct the office in his absence, which lasted twenty-one days, and during which time the prisoner is said to have filled up checks and drawn out the money of the city of St. Louis to the amount of \$46,000 and converted it to his own use.

Our statute creating or defining the crime of forgery enlarges upon the common-law definition and covers almost every conceivable alteration or felonious interference with instruments of writing creating or transferring, enlarging or diminishing money obligations. (Gen. Stat. 1865, ch. 202, §§ 8, 16.) No special intent to defraud is necessary to constitute forgery. If the probable or natural consequence of the act be to defraud, that will, in law, constitute the fraudulent intent of the statute, and such intent will be enforced in law. (1 Eng. Crim. Cas. 291; 2 Russell on Crimes, 362; Arch. Crim. Pr. 342; Regina v. Beard, 34 Eng. Com. Law, 329; Regina v. Parrish, *id.* 307;

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8 Car. & P. 94.) The making a false and fraudulent instrument over a genuine signature is as much a forgery as the making a false signature to a genuine writing. (Hall v. Fuller, 5 B. & C. 750.) The instrument must be genuine in all particulars. (Rex v. Minterhart, 7 Car. & P. 652; Regina v. Wilson, 2 Car. & K. 528; 2 Coxe C. C. 360, 426; Rex v. Hart, 1 Moody C. C. 486; Regina v. Balmer, 1 Coxe C. C. 186.) Authority to do a particular thing furnishes no authority to do another and different thing. (2 Bish. Crim. Law, 306, 477.) A signature fraudulently obtained has been held to be a forgery. (State v. Shurtliff, 6 Shepley, 368; Rex v. Hart, 9 Car. & P. 752.) In Rex v. Hart, Ryan & M. Crim. Cas. 486, it was determined by all the judges of England, without a dissent, that the filling up a blank check with £500, when authority was to fill up for £200, was forgery. The same doctrine is clearly recognized in 2 Russell on Crimes, 321; Arch. Crim. Pr. 342. The act must be authorized, otherwise it is a forgery. (Regina v. Beard, 34 Eng. C. L. 497; 7 C. & B. 294; Goodman v. Eastman, 4 N. H. 455.)

The entire argument of the learned counselors for the prisoner proceeds upon a mistaken notion that the principles applicable to civil cases furnish the rule for determining what acts are necessary to constitute the crime of forgery in a State prosecution. In two or three of these civil cases remarks are found apparently favoring their position. Where this error occurs it is mostly out of mere inadvertence, and can furnish no force or authority in a criminal case, as the matter of mere civil liability could in no sense determine the question of the guilt or innocence of the party filling up the blanks contrary to his authority. This question could alone be determined by the criminal tribunals of the country, so as to furnish precedents and authority for the case at bar.

It is claimed and stated that the doctrine on this subject is different in this country from that of England. This we deny. English courts have repeatedly held that forgery could not be pleaded in bar against the holder; but the same courts have as often held the accused guilty of forgery on criminal prosecution. (2 Car. & K. 528; 7 C. & B. 652; 1 Coxe C. C. 186; 1 Moody

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C. C. 486; 2 Coxe C. C. 360, 426.) The doctrine held on the civil side of the court was clearly and fully laid down. (Russell v. Longstaff, Dougl. 514.) This doctrine has never been departed from by the English courts, so far as we have been able to find. It is contended that this doctrine has recently undergone a change in the courts of that country. (See *Awde v. Dixon*, 6 Excheq. 869.) Parke, B., in his opinion in this case, remarks that a party who takes a blank note can not recover upon it unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case. *State v. Santee*, 22 Penn. 39, and *State v. Flanders*, 38 N. H. 324, are cases where the signatures to genuine instruments were procured through fraud and false pretenses, and therefore not forgeries; in which we fully concur. This has always been the doctrine of the Court of King's Bench and all other courts of England, except one case at Star Chamber, many years ago, in the execution of a will, decided *ex parte*. (*Regina v. Collins*, 2 Moody & R. 461; *Regina v. Chadwick*, *id.* 545.)

We have, in conclusion, one more consideration to urge. It is the relation sustained by the forger to the instrument forged, and the fund sought to be reached by this forgery. This check was forged in the city treasurer's office. The funds of the city against which it was drawn were on deposit for the city in its banks of deposit. The prisoner knew he had no power to erase and fill up the check for his own use. He also knew that no one could confer any such power upon him. He knew the fund could not be interfered with without the intervention of a joint maker. Until the co-surety has joined in its execution by signing the space left by defendants for his signature, it was invalid and incomplete. It was not a note signed in blank to be filled up. It was a joint note, signed by one of its makers only, and could not become complete until the other had signed. And the plaintiff took it solely on the false representation that the defendant had authorized it to be delivered as a complete and binding instrument. In principle, this case is not unlike the creation and delivery of a note by affixing the name of the maker without any authority whatever. The declaration made, that the party signing the name

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had authority to use the name of another, could in no sense make the payee a *bona fide* holder unless it could be shown that he had authority to sign the name of the maker.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted in the Criminal Court for forgery in the third degree. The charge in the indictment was that on the 11th day of December, 1869, with intent to injure and defraud, he willfully and feloniously falsely made, forged and counterfeited a certain check for the payment of money, purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis, with intent to defraud and injure the Traders' Bank.

As it is claimed that the indictment is defective, it is sufficient to say that it is abundantly good according to the decision of this court in the case of *The State v. Fenly*, 18 Mo. 445.

The main question, and only question requiring any attention, is whether the crime with which the defendant stands charged constitutes forgery. In substance the testimony at the trial was that Susisky was treasurer of the city of St. Louis, and that he deposited the moneys of the city in seven of the principal banks of St. Louis, amongst which were the National Bank of the State of Missouri and the Traders' Bank; that on the 2d day of December, 1869, Susisky was called away from St. Louis to the city of New York on private business, and immediately before leaving signed a couple of checks, in the blank form set out in the indictment, upon the various banks in which the moneys of the city were kept, and left them in the office of the city treasurer, uncut from the different check-books of the city for the different banks, and also gave his deputy city treasurer, Wm. Dougherty, a power of attorney to act in his place during his absence from the office; that on leaving the office for New York, he requested the accused, who had formerly been city treasurer, to call into the office occasionally, supervise his deputy, and see that everything was properly conducted; that Susisky, on leaving the office, placed the check-book of the National Bank of the State of Missouri in the large safe of the treasurer's office, and directed

Dougherty and the defendant to fill up the checks on the National Bank of the State of Missouri to the use of the holders of warrants against the city as they were audited and presented, and if the funds of the city in said bank should become exhausted, then they might have recourse to the Traders' Bank; that the funds of the city in the National Bank of the State of Missouri and the blank checks of Susisky upon that bank were sufficient to meet all demands of the city, and pay all warrants audited and allowed against it until the return of Susisky, which occurred on the 22d or 23d day of December, 1869; that the defendant called in the treasurer's office almost daily, overlooked the affairs of the office, but filled up no checks to the use of the city or for the use of persons having claims or warrants against it, all this being done by Mr. Dougherty; that on the 11th day of December, 1869, the defendant took from the check-book of the Traders' Bank, which was kept in the office desk of the treasurer, and the check set forth in the indictment, inserted the date, the words "*cash or bearer*," and the sum of \$6,000 in words and figures; that the bank check had the printed words "*order of*;" that these words were erased by running the pen across them in double lines, but by whom this erasure had been made could not be stated; that the defendant converted the check thus drawn to his own use, by depositing it on the same day to his private account in the First National Bank, which sent it to the clearing-house, where it was paid by the Traders' Bank, out of the funds of the city of St. Louis which had been deposited with it.

It is contended that these facts do not constitute the offense of forgery; that defendant's filling up the check contrary to his authority, and his conversion of the money to his own use, simply amounted to a breach of trust and confidence, for which he could not be punished criminally. In support of this view the class of cases have been referred to which hold that where a person indorses a note in blank, with the understanding that it shall be afterward filled by the maker with a certain amount, and the maker fills the note with a larger amount than that agreed upon, this conduct on the part of the maker only amounts to a

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breach of confidence, and it will be no defense to an action on the paper in favor of an innocent indorsee for value.

Those cases are civil cases, and founded upon principles of commercial law. Where there is original authority for the issuance of a negotiable instrument, any latent defect will not avoid or affect it in the hands of a *bona fide* or innocent holder. A general indorsement on a blank note is a letter of credit for an indefinite sum; and where it is filled up, and there are no circumstances of suspicion to put the indorsee on his guard or to call forth inquiry, the indorser will be estopped from disputing the regularity of the transaction. (See *Tumelty v. The Bank*, 13 Mo. 276; *Farmers' Bank v. Garten et al.*, 34 Mo. 119; *Henderson v. Bondurant et al.*, 39 Mo. 369.)

In civil cases this rule is founded in commercial policy, and also in the doctrine announced by Lord Holt in *Horn v. Nichols*, 1 Salk. 289, that where one of two innocent parties must suffer by the fraud of a third person, he who has trusted such third person and enabled him to deceive the others, is to abide the consequences of the fraud, however innocent he may be in other respects.

The leading case relied on by the counsel for the defendant is *Partman v. Sullivan*, 4 Mass. 45. In that case one of the defendants being abroad in Europe, the other, having occasion to be absent, intrusted with a clerk of the house to which they belonged a number of papers on which one of the firm had written the name of the firm in blank. These papers were to be used for particular purposes by the clerk, and he was directed to deliver one of them to a particular individual, who afterward, by fraud and imposition, obtained four of the papers instead of one, and having used one of them for the purpose for which the house had directed a blank indorsement to be given him, and another for making a note, which he negotiated to the plaintiff, with the indorsement remaining in blank, it was held that the indorsers were liable, on the ground that the loss had been occasioned by this misplaced confidence in a clerk too young or too inexperienced to guard against the arts of the person who had obtained the papers. This is the only point there was in the case; but

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Parsons, C. J., in the course of his reasoning, declares that the wrong perpetrated by the party did not constitute the offense of forgery. So, Judge Ryland, in *Tumelty v. The Bank*, *supra*, says that the evidence in that case did not warrant the court in declaring that the indorsements were forgeries. On the other hand, where two parties made a note, and one of them, before he delivered it to the payee, altered it so as to make it call for a larger sum, the court in New Hampshire declared the alteration a forgery. (*Goodman v. Eastman*, 4 N. H. 455; see also *Hall v. Fuller*, 5 B. & C. 750.)

The above cases were decided upon principles not necessarily calling in question their criminal aspect. Because the law, on principles of policy, will protect a third person who has dealt with an agent who has committed a wrong, it does not follow as an inevitable conclusion that the wrong-doer is to go unpunished.

The statute of this State declares that "every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, charged or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased, or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not hereinbefore declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree." (1 Wagn. Stat. 470, § 16.) This statute makes the crime of forgery more comprehensive than it existed at common law.

In *Regina v. Collins*, 2 Moody & R. 461, it is decided that it is not forgery fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. The same doctrine is repeated in *Regina v. Chadwick*, 2 Moody & R. 545. Where a person wrote a promissory note for \$141.26, and fraudulently read it to another, who was unable to read, as a note for \$41.26, and procured him to sign it as a maker, and it was held that it was not forgery. (*Commonwealth v. Sankey*, 22 Penn. St. 390.) But in *Regina v. Bateman*, 1 Cox C. C., the pre-

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cise question arising in this case was presented, and it was there held that where a party receives a blank check signed, with directions to fill in a certain amount, and to appropriate the instrument to a certain purpose, and he fraudulently fills in a different amount and devotes the check to other purposes, he commits forgery. Mr. Justice Erle said: "If a check is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If the blank check was delivered to him with a limited authority to complete it, and he filled it up with an amount different from the one he was directed to insert; and if, after the authority was at an end, he filled it up with any amount whatsoever, that, too, would be clearly forgery." And Mr. Justice Patterson said: "I quite agree with my learned brother, that if the prisoner filled up the check with a different amount and for different purposes than those which his authority warranted, the crime of forgery would be undoubtedly made out."

In *Regina v. Minterhart*, 7 Car. & P. 652, and 2 Brit. C. C. 486, it was held that if a person having the blank acceptance of another be authorized to write on it a bill of exchange for a limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, it was forgery.

In *Regina v. Wilson*, 2 Car. & P. 527, it appeared that the prisoner was the clerk of John McNicoll, and that a bill for £156 9s. 9d., for which Mr. McNicoll was bound to provide, falling due on the 8th of December, Mr. McNicoll on that day signed a blank check, with the signature of John McNicoll & Co., and gave it to the prisoner, directing him to fill the check up with the correct amount due on the bill (which was to be ascertained by reference to the bill-book), and the expenses (which would amount to about 10s.), and after receiving the amount at the Liverpool Borough Bank, to pay it over to a Mr. Williamson, in order that the bill might be taken up. Instead of doing so, the prisoner filled up the check with the amount of £250, which sum he immediately received at the bank, and without paying any part of the money over to Mr. Williamson,

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retained the whole of it in his own possession, in satisfaction of a claim for salary which he alleged to be due to him. On the day after the receipt of the money on the check he sent in an account of his claim, giving his master credit for the sum received on his check. On these facts, Cottman, J., in summing up, told the jury that if they were satisfied that the prisoner was authorized only to fill up the check for the amount of the bill and expenses, and to pay the proceeds to Williamson, and that he filled it up for a larger sum and applied the money when received to his own purposes, that was evidence for their consideration of an intention to defraud Mr. McNicoll, as alleged in the indictment. The jury found the defendant guilty of forgery. The case was afterward considered by the fifteen judges, who unanimously held the conviction right.

In the cases of *Regina v. Collins* and *Regina v. Chadwick*, and *Commonwealth v. Sankey*, the signers of the instruments had not put them in circulation, and by ordinary caution had the power to prevent imposition. But in the present case the check was signed with specific instructions, and the defendant, in filling up, clearly made a false instrument. I am of the opinion that, under the statute and according to the authority of the adjudged cases, the defendant was rightfully convicted of forgery.

Judgment affirmed. The other judges concur.

THOMAS L. HARPER, BY THOMAS WOOD, HIS NEXT FRIEND,
Respondent, v. THE INDIANAPOLIS AND ST. LOUIS RAILROAD
COMPANY, Appellant.

1. *Damages — Railroad companies — Negligence — Servant — Skill — Liability of company.* — A servant who has been injured by the negligence, misfeasance or misconduct of a fellow-servant, can maintain an action therefor against the master, where the servant, by whose negligence or misconduct the injury was occasioned, was not possessed of ordinary skill or capacity in the business intrusted to him, and the employment of such incompetent servant was attributable to the want of ordinary care on the part of the master.
2. *Railroad company, action against for damages — Fireman, incompetent — Permission by engineer to act in his place — Liability of company.* — In suit against a railroad company for injuries done to plaintiff, if it appear that

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the company was negligent or unmindful of its duty in employing competent and skillful servants in the execution of its business, and that injury resulted therefrom to a fellow-servant, it must be held responsible; and of the sufficiency of the proof to sustain this fact, the jury are the proper judges. And permission given by the company to an engineer to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty.

8. *Evidence — Witness, impeachment of, on irrelevant matter.* — A witness is not to be interrogated on a subject not pertinent to the issues involved, for the mere purpose of discrediting him.

Appeal from St. Louis Circuit Court.

Hanna, and Garesche & Mead, for appellant.

I. The proof was uniform that the company tolerated the practice of engineers, at switches and on side-tracks, allowing their firemen to handle the locomotive only when the engineer deemed the fireman competent to do so. Even then the fireman was held responsible for the train. (Talmadge, 41.) The instruction ignores the fact altogether, yet it is a most important fact; for if the engineer, Griffith, imprudently confided the locomotive to Blansfield, an inexperienced or unskillful person, it was negligence of Griffith, but for which the company can not be held responsible, because negligence of his co-employee was one of the risks plaintiff assumed when he entered defendant's employment.

II. The company was relieved of liability when it provided a competent fireman and a competent conductor. If plaintiff seeks to recover because the engineer thought the fireman competent, and hence trusted to him the engine, it was his negligence, and plaintiff could not recover. This rule, so strictly enforced by our own decisions, is still more strictly upheld in Illinois, where the accident occurred, and where plaintiff and his father resided. (Cox v. Ill. Cent. R.R., 21 Ill. 25.) In Brinkman v. Cent. R.R., 2 Lansing, 514, cited by respondent, the opinion is not adverse to us. It coincides exactly with Gibson v. Pacific R.R., 46 Mo. 163; Stevens v. N. Y. Cent. R.R., 1 Lansing, 110; Dynen v. Leach, 221, 26 Law J., April, 1857; Redf. Railw. 695; Shearman & R. Negligence, 110. This court has ruled that a defend-

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ant can not impute a want of vigilance to one injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on the part of the defendant. Had he done his duty and stopped the train the accident could not have occurred. (*Kennayde v. Pacific R.R.*, 45 Mo. 262; *Morrissey v. Wiggins Ferry Co.*, *ante*, p. 521.)

Leverett Bell and *E. B. Sherzer*, for respondent.

The delegation of authority to the engineer by the defendant, to supply his (the engineer's) place with a fireman, is unquestioned. It is admitted that the fireman was incompetent as an engineer. The act of the engineer was, then, the act of the company, and the result necessarily follows that it was the defendant who permitted and authorized the fireman, Blansfield, to control the engine.

To us it seems clear that if a railroad corporation permit a fireman to manage an engine, it must be held responsible for the consequences. It will not do to say it "believed" him competent, or it had "no knowledge" of his incompetency; for as a part of its duty to and contract with its servants, it agrees to employ or use reasonable efforts to obtain persons fitted for the various duties assigned them; and as it steps out from or transgresses upon the plain dictates of reason and right, it becomes amenable under the law. That a fireman is not an engineer is true; that therefore he is incompetent to fill an engineer's station, follows as a matter of presumption at least. Here the incompetency of the fireman was conceded, and the additional fact given in evidence that he was a fireman with but nineteen days' experience as such, having previously been a laborer. (See *Ill. Cent. R.R. v. Jewell*, 46 Ill. 101.) Railroad corporations are bound to know the qualifications of their employees.

The authority to supply an engineer's place on a locomotive, by a fireman, is a violation of the company's duty, and in itself evidence of the greatest negligence. No custom can affect it, for it is against law and reason. A railroad corporation can only escape the consequences of such an act by fully and satisfactorily establishing the competency of the fireman to perform an engi-

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neer's duties. That defense was not made in this case. The incompetency of the fireman was admitted.

If it be contended by appellant that this action falls within the decisions of this court, upon the doctrine that an injury resulting from the negligence of a fellow-employee is not actionable, we might content ourselves by referring to the opinion of this court, in 44 Mo. 488, as a complete answer to such a proposition. In no sense did the injury herein complained of result from the negligence of a fellow-employee. True it is that the engineer, under an authority to appoint a competent person, appointed one, now admitted by defendant to have been incompetent for the position and duties. But it was the power to appoint one outside of that recognized class of skilled persons known as engineers, to manage the engine, that constituted the negligence complained of in this case. The power was general, and the engineer passed upon the competency. The appointment of an incompetent person, therefore, did not, as to the particular party or act, operate as a revocation of his authority; and defendant will not be permitted to say, if competent, that he was in by authority; if not, that permission was not given.

We say that permission and authority being given the engineer to appoint a fireman to the duties of an engineer, irrespective of the term of his service as such fireman, and pass upon his competency, the engineer does not, under such a power, act in his capacity as engineer. If he appoint an incompetent person, it is not because he is exercising his duties as an engineer in the management of his engine, but by virtue of a superadded and delegated power. He then becomes the agent of the company to select a substitute, and his action binds the company, not from his being an engineer, but in that he is acting by a delegated power, and one such as might be conferred on any other person not an engineer. In no sense does it come under the recognized duties of an engineer, nor flow as an incident from his employment. His act, therefore, in appointing a fireman to the duties of an engineer, being by permission of the company, by virtue of this agency, is the act of the company; and in appointing a fireman — one not an engineer or recognized as such — to an

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engineer's duties, it becomes the company's negligence. (Cayzer v. Taylor, 10 Gray, 281, approved by this court in Gibson v. Pacific R.R., 46 Mo. 163; Buckner v. N. Y. Cent. R.R., 2 Lansing, 516; Snow v. H. R.R., 8 Allen, 444.)

WAGNER, Judge, delivered the opinion of the court.

This case was here on a former occasion, and will be found reported in 44 Mo. 488. The action was for damages, and after it was sent back by this court for a re-trial, there was an amended petition and a verdict for the plaintiff. The amended petition states "that on the 9th day of July, 1867, plaintiff was in the employ of defendant as conductor of one of its construction trains running on said road; that on said day, while plaintiff was discharging his duties as conductor of said train, he was, without any carelessness or negligence on his part contributing thereto, but solely through the mismanagement of the locomotive engine attached to and drawing said train, thrown on the railroad track and injured, etc.; that the injuries so complained of resulted to plaintiff while he was in the performance of his duties as aforesaid, without any carelessness on his part contributing thereto, solely and directly from the fault, negligence and want of care of defendant, in this: that there was no engineer at said time upon or in charge of said locomotive engine, but the same was then and there, without the knowledge or consent of plaintiff, but with the knowledge and by permission and authority of defendant, being managed and controlled by a fireman, said fireman being then and there, with the knowledge and by permission and authority of defendant, in the performance of an engineer's duties in and about said locomotive engine; that said fireman was not an engineer, nor was he fit or competent to perform the duties of an engineer in and about said locomotive engine, of all which defendant at said time had full and competent knowledge."

The defendant, answering this petition, failed to deny, and therefore admitted, that the fireman in charge of the engine at the happening of the injury was not fit or competent to perform the duties of an engineer in and about the locomotive engine, and that plaintiff suffered injury. All the remaining allegations

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of the amended petition were controverted by the answer. Certain affirmative matter stated in the answer was denied in a reply filed by the plaintiff, but it was expressly admitted in the replication that William Griffith, the engineer who had been assigned to the locomotive of the train whereof plaintiff was conductor, was, at the time of the happening of the injury, a competent and skillful engineer.

The following abstract of the testimony presents the essential facts as proved upon the trial: that in February or March, 1866, plaintiff was appointed conductor of a construction train on defendant's railroad, and continued in defendant's service in that capacity until July 9th, 1867, when he suffered the injury complained of. His duties as conductor were to direct the engineer when and where to move the train; to superintend and oversee a party of twenty or thirty laborers attached to the train when at work, and to act as brakesman and switchman where his services in those capacities were required. Plaintiff had no other authority over the engineer than that stated above; and with the management and control of the locomotive he was not permitted to interfere, that being a skilled employment.

The fireman was subordinate to the engineer and not subject to the orders of the conductor. At the time of the happening of the occurrence which gave rise to this suit, William Griffith was engineer of the locomotive attached to the train, and James Blansfield was fireman. Blansfield was appointed fireman on the 20th of June, 1867, previous to which time he had been a laborer. On the afternoon of July 9th, 1867, having finished work at Alton, plaintiff directed Griffith to take the train to Alton Junction, a distance of two or three miles; to slack up on arriving there, that plaintiff might cut off the last car, and then place the train in the sand-pit, a few hundred yards beyond the station. The train consisted of twelve or thirteen platform cars and a box-car, which was next to the engine. As the train arrived at the junction, plaintiff walked back, and, standing at the end of the last car but one, with his back to the locomotive, stooped down and pulled out the coupling-pin. Before he could recover an upright position, the train, which had slacked its speed and was moving

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slowly, started suddenly ahead, plaintiff was thrown on the track, and was run over by the car which had been cut off and which was slowly following the train. When this occurred the engineer was on the platform at the junction, having, without plaintiff's knowledge, left the locomotive to the charge and management of Blansfield, the fireman, who had pursued that occupation but nineteen days. The movement of the train which threw plaintiff off was caused by the fireman letting on the steam. Plaintiff says in his testimony that he intended, after replacing the pin and regaining an upright position, to wave his hand for the engine to move ahead, but was prevented by the hasty and negligent act of Blansfield, who started without waiting for the signal. Upon this point there was evidence given for the defense tending to show that the plaintiff did give the signal; but this was rebutted by counter-testimony in support of the plaintiff's statement. The evidence was conflicting, and therefore the jury alone could determine the fact. It was further testified that on defendant's railroad, with the knowledge of the superintendent of engineers, and without objection from or any restraint imposed by them, firemen were permitted to manage locomotives, in the absence of the engineers, at side-tracks, stations, and when switching, if deemed competent to do so by their respective engineers; and that, in accordance with this state of facts, Griffith, deeming Blansfield competent, had, prior to the injury, yielded up the management of the engine to him. It was also shown that the management of a locomotive so far involved science, skill and experience, that firemen served an average term of three years as firemen before they were considered competent to assume the duties and responsibilities of engineers. Upon this state of facts the court gave the following instructions for the plaintiff:

"1. If the jury believe from the evidence that the plaintiff, while in the employ of the defendant, without any fault or negligence on his part contributing thereto, through the mismanagement of the locomotive engine by a fireman, suffered injury, and they further believe from the evidence that the superintendent of engineers on, or superintendent of, defendant's road knew that the engineers of defendant's road permitted firemen to manage

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and control locomotive engines, in the absence of engineers, about switches and stations, and failed or neglected to prohibit the same, then, unless plaintiff had knowledge that the fireman was permitted to do an engineer's duty therein on said engine, or was at the time of the accident performing said duty, they will find a verdict for the plaintiff.

"2. The jury are instructed that it stands admitted by the pleadings in this case that the fireman, who at the time of the accident was in charge of the locomotive engine, was not fit or competent to perform the duties of an engineer in and about said locomotive engine."

The other instructions need not be noticed, as no point is made upon them in this court. For the defendant the court gave these instructions:

"1. The jury are instructed that, it being admitted by the plaintiff in his pleadings that William Griffith was a competent and skillful engineer, the plaintiff is forbidden to dispute the fact, and the jury must discard from their consideration so much of the testimony of John Harper as related to the incapacity or want of sobriety of Griffith.

"2. The jury are instructed that if they believe from the evidence that, at the time of the injury sued for, plaintiff was in defendant's employ as a conductor of one of its trains, and in the discharge of his duties as such; that the injury complained of was occasioned either by plaintiff's own carelessness, unskillfulness or negligence, or by that of the engineer or other person in charge of the train, they should find for defendant, provided defendant has exercised proper care in the selection of persons competent for the performance of the respective duties of engineer and fireman of the train whereof plaintiff was, at the time of the injury, conductor.

"3. The jury are instructed that if they believe from the evidence that plaintiff, by his own recklessness, carelessness or unskillfulness, contributed to the injury for which he sues, or that by the exercise of ordinary care, skill or prudence on his part the accident could have been avoided, they will find for defendant."

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The following instructions, which it is deemed necessary to notice as numbered in the series, and which were offered by the defendant, were refused :

“5. The jury are instructed that the incapacity of the fireman to act as an engineer does not justify a recovery against defendant unless it has been established that the defendant authorized him to act as such ; and a permission to the engineer, when the fireman was by the engineer deemed competent to act temporarily as engineer, does not make the defendant responsible for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for the duty.

* * * * *

“7. The jury are instructed that it is admitted by plaintiff in his pleadings that William Griffith, the engineer of the train at the time of the accident sued for, was a careful, competent and skillful engineer ; if, therefore, the jury should find from the evidence that Griffith was guilty of negligence in surrendering charge of the locomotive engine of the train to one who was incompetent to manage it, and that plaintiff's injury was the result of such negligence, plaintiff is not entitled to recover, because the negligence of his fellow-servant was one of the risks he assumed by his hiring to defendant.

“8. The jury are instructed that if they believe from the evidence that plaintiff was, at the time of the accident sued for, in defendant's employ as one of the conductors of its trains, and that the injury sued for was occasioned by the negligence, carelessness or unskillfulness of one of those employed by defendant on the same train, and this without the knowledge or consent of defendant, then plaintiff is not entitled to recover, if defendant has taken proper care to engage competent servants to perform the duty assigned to them, or if the plaintiff, at the time of the accident sued for, knew that the fireman only of the train was in charge of the engine, and plaintiff was acquainted with the fireman's ability and skill to perform the duties of engineer.

“9. The jury are instructed that if they believe from the evidence that the injury was the result of the negligence or unskillfulness of one James Blansfield, a fireman at the time

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acting as engineer, and unfit to perform the duties of an engineer; that Blansfield acted as engineer in compliance with a custom of the defendant to permit its firemen, in the absence of the engineer, to act as such, at stations or when switching; that this custom existed before plaintiff was employed as a conductor for defendant, and became known to him after his employment as conductor, then plaintiff is not entitled to recover."

The tenth instruction, in reference to the person in charge of the engine being subordinate to the plaintiff, was properly refused, there being no evidence to justify it.

The jury, in finding a verdict for the plaintiff, acting under the instructions of the court, must have found, and did find, that the plaintiff received the injury, and that he did not contribute thereto; that the accident happened in consequence of the mismanagement of a locomotive engine by a fireman; that the fireman was managing the engine with the knowledge or by permission or authority of defendant, and that this was without the plaintiff's knowledge or consent. The incompetency of the fireman to act as engineer is conceded. With the weight of the evidence we have nothing to do; the jury have passed upon that, and their verdict binds us. We have only to inquire whether the law was correctly laid down by the court.

Whilst this court has followed the prevailing doctrine that a servant of a corporation who has been injured by the negligence, misfeasance or misconduct of a fellow-servant, can maintain no action against the master for such injury, yet it has been expressly held otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, or where the servant by whose negligence or misconduct the injury was occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. (*McDermott v. Pacific R.R. Co.*, 30 Mo. 115; *Rohback v. Pacific R.R. Co.*, 43 Mo. 187; *Gibson v. Pacific R.R. Co.*, 46 Mo. 163.)

In *Shearman & Redfield on Negligence* it is said that "proof of the employment of one who had always been a mere clerk or

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a common laborer, to run a steam engine, would raise a presumption of negligence on the part of the master, without showing that he had actual notice of the servant's antecedents;" for, as the authors state in another place, "it is the duty of a master to employ servants of sufficient care and skill to make it probable that they will not cause injury to each other by the lack of those qualities." (Shearm. & R. Negl., §§ 90-1.)

In the case of *The Ill. Cent. R.R. v. Jewell*, 46 Ill. 99, it was held that the company was liable to a fellow-servant for an injury received while in their employment, resulting from the incompetency of an engine-driver, where that incompetency was known to the company. In *Wright v. N. Y. Cent. R.R. Co.*, 25 N. Y. 565, the court says: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied." In a later case in the same court, while recognizing and laying down the general rule that a master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business, the court proceeds to say: "The only ground, then, which the law recognizes, of liability on the part of defendant, is that which arises from personal negligence, or such want of care and prudence in the management of its affairs or the selection of its agents or appliances, the omission of which occasioned the injury, and which, if they had been exercised, would have averted it." (*Warner v. The Erie R.R. Co.*, 39 N. Y. 471.)

In *Snow v. Housatonic R.R. Co.*, 8 Allen, 444-5, the Supreme Court of Massachusetts examines the principle and gives the rule the following clear exposition: "Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged—among which is the negligence of other servants employed in similar

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services by the same master — it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury." The case of *Noyes v. Smith*, 28 Verm. 63, is also a case adopting the same principle; and while it recognizes fully the rule that a master is not liable to his servant for an injury occasioned by the negligence of a fellow-servant in the course of their common employment, the court says: "Such rule has no application where there has been actual fault or negligence on the part of the master, either in the act from which the injury arose or in the selection or employment of the agent which caused the injury." This opinion is sustained by citing to its support the case of *Hutchinson v. Railw. Co.*, 5 Wells, Hurl. & G. 352, which also thus qualifies the rule that the master shall have taken due care not to expose his servants to unreasonable risks. The Vermont court there lays down this rule: "The master, in relation to his fellow-servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe and trustworthy; and for any neglect in exercising that diligence he is liable to his servant for injuries sustained from that neglect." It is not necessary that he should know that they are unsafe and incapable. It is sufficient that he would have known it if he had exercised reasonable care and diligence. (*Id.*, and cases cited; *Gibson v. Pacific R.R. Co.*, 46 Mo. 163.) Again, in the case of *Gilman v. The Eastern R.R. Corporation*, 10 Allen, 233, 239, an employee of the defendant brought his action for an injury occasioned by the negligence of a switchman in failing properly to adjust the switch upon the track. The court held that the plaintiff, being a fellow-servant in the employ of the same railroad company, could not have recovered of their common master; but they add: "The evidence offered by the plaintiff at the trial was competent to show that the

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defendant, knowingly or in ignorance, caused by its own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendant caused the injury, and that he himself used due care, he may maintain his action." In the same case they say: "It is well settled, both in England and America, that a master is bound to use ordinary care in providing his structures and engines and in selecting his servants, and is liable to any of his fellow-servants for his negligence in this regard."

These cases incontrovertibly establish the law and overwhelmingly support the theory upon which the case was submitted to the jury by the instructions. If the defendant was negligent or unmindful of its duty in employing competent and skillful servants in the execution of its business, and injury resulted therefrom to a fellow-servant, it must be held responsible. And of the sufficiency of the proof to sustain this fact the jury were the proper judges. The instructions given on both sides fairly and substantially embraced these views, and we think, therefore, that they were unobjectionable. As the whole case was presented by the instructions given, we see no error in the refusal of instructions for defendant, as, with one exception, they asserted nothing that was not sufficiently covered by those given. That exception is in the one numbered five in the series, and declares that a permission to the engineer, when the fireman was by the engineer deemed competent to act temporarily as engineer, did not make the defendant responsible for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for the duty. This instruction concedes the authority from the company to the engineer to allow a fireman to handle the engine, but denies that the employment by the engineer is to be considered the act of the company.

Corporations can only act through their agents, and when they delegate power to an agent, and he executes that power, it is the act of the corporation. To say that where an officer or agent acts in pursuance of authority, a corporation may shirk its responsi-

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bility by resorting to the device that his act was not the act of the corporation, would be monstrous injustice, and would effectually abrogate the sound old maxim, "*qui facit per alium facit per se.*" This very question was recently raised in the Supreme Court of the State of New York, and received a most masterly discussion by Mr. Justice Potter. In the course of his able opinion he says: "A corporation can not act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves represents the corporation as master in all these respects; and though in the performance of these executive duties he may be and is a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may also labor like other co-laborers, and may be in that respect a co-laborer, and his negligence as such co-laborer, when acting only as a laborer, may be likened to that of any other, yet when, by appointment of the master, he exercises the executive duties of master—as in the employment of servants, in the selection for adoption of the machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of other and subordinate servants—then his acts are executive acts, are the acts of a master, and then corporations are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent, within his sphere, may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives,

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in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He, then, only speaks their executive will; not the irresponsible will of a fellow-workman or co-laborer. The corporation can speak and act in no other way. His executive acts are their acts; his negligence is their negligence; his control, their control. He has in this executive duty no equal. He is not, while in the performance of these executive duties, only the equal of the common co-laborer or co-servant." (Brickner v. N. Y. Cent. R.R. Co., 2 Lansing, 506.)

If there are any cases which sustain the defendant's view on this point, I have been unable to find them. The result of such a doctrine would be to open a door to allow corporations to escape all responsibility for accidents occasioned by the negligence of their executive agents, and thus make it profitable for such institutions to manage all their affairs in that way. I see no error in the court's refusing the instruction. It asserts a principle contrary to law and sound morality.

It is objected, too, that the court erred in ruling out certain evidence offered for the purpose of impeaching the testimony of the plaintiff's father. The father testified on the trial that he had not said that no one was to blame for the accident that happened to his son. Evidence was offered on this point to contradict him. The father was not present at the time of the injury, and, consequently, what he said in this regard was irrelevant and immaterial — being mere hearsay and totally inadmissible. A witness is not to be interrogated on a subject not pertinent to the issue, for the mere purpose of discrediting him. It was wholly immaterial as to what the father stated in reference to the accident or how it happened, as he was not present at the occurrence and was not competent to speak concerning it. I have observed nothing else in the record requiring any particular remark or consideration.

The judgment must be affirmed. The other judges concur.

The State of Missouri, to use of Peters, v. Koch et al.

THE STATE OF MISSOURI, TO USE OF FRANK PETERS, Appellant,
v. LOUIS KOCH *et al.*, Respondents.

1. *Attachment, claim for property under — Act of 1855 — Deed of trust, beneficiary in, party in interest.* — The beneficiary in a deed of trust of personal property is a party in interest, under the act of March 3, 1865, "concerning the duties of sheriff in St. Louis county" (Gen. Stat. 1865, ch. 160, §§ 28-9), and may file his claim with the sheriff and sue upon the bond taken.
2. *Conveyances — Deed of trust — Sale — Merger.* — The grantee of personal property under a deed of trust does not forfeit his title under the deed by reason of the fact that the same property is afterward transferred to him by an absolute bill of sale which is void because not followed by a change of possession. (Wagn. Stat. 281, § 10.) The title under the deed does not merge in that acquired by the sale. The legal title under the deed was in the trustee, and the subsequent sale was only that of an equity.

Appeal from St. Louis Circuit Court.

E. C. Kehr, for appellant.

The sale did not cancel or satisfy the previously existing deed of trust. 1. The bill of sale was not taken or intended as payment or satisfaction of the deed of trust; on the contrary, it was founded on a new and distinct consideration. 2. Eichmann having remained in possession, the sale was void (Wagn. Stat. 281, § 10); whereas the deed of trust, being acknowledged and recorded, was valid by section 8 of the same act. (Howell v. Bell, 29 Mo. 137-8.) 3. The deed of trust did not merge in the bill of sale, because, (a) To constitute merger there must be a union of two estates in one person. Here the deed of trust put the title in Wagner and the bill of sale in Peters. Under the deed of trust, Peters claimed as *cestui que trust*; whereas under this bill of sale he holds an estate at law in his own right. (b) To constitute merger there must be a greater and less estate; here the estates are of equal degree. (c) The estate created by the bill of sale being void, it could absorb nothing; and hence the basis for a merger was wanting. (d) Merger is a technical doctrine of the law, applicable alone to real estate, and not to personal property.

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F. & L. Gottschalk, for respondents.

It appears that plaintiff, Peters, first took a deed of trust from Eichmann, and afterward purchased absolutely the same property from Eichmann. Under such circumstances the deed of trust merged in the sale, and plaintiff could not bring his action on the deed of trust. He left Eichmann in possession of the property after such sale to him, and therefore creditors of Eichmann had a right to attach.

WAGNER, Judge, delivered the opinion of the court.

Eichmann was indebted to Peters in the sum of \$170, and, to secure the same, executed a deed of trust on certain furniture in his house. The deed of trust was regularly recorded. Subsequently the respondent Koch sued out an attachment against Eichmann, and caused the property conveyed by the deed of trust to be levied upon and sold. The trustee named in the deed of trust declining to act, Peters filed his claim under the sheriff's and marshal's act, applicable to St. Louis county, and thereupon the sheriff took from the respondents an indemnifying bond conditioned to make good to Peters all damages arising from the levy and sale of the property. This suit was instituted upon the bond so taken. Upon the trial the existence of the debt, and good faith in the execution of the deed of trust securing the same; the insolvency of the debtor; the levy and sale under the attachment of the property covered by the deed, and the value thereof, were clearly proved.

The main defense set up in the answer and relied on was that Peters and Eichmann combined and conspired together to delay, hinder and defraud the creditors of Eichmann, and for that purpose and with that intention Eichmann conveyed and Peters accepted a conveyance of the personal property, and that Eichmann still remained in possession and was the owner of the property. This related to an absolute sale made subsequent to the deed of trust; and as it constituted new matter, and no reply was filed, it must be taken as confessed. The court, at Special Term, gave judgment for the plaintiff; but this judgment was reversed at

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General Term, and the plaintiff brings the case here for review.

That the plaintiff, as the real party in interest in the deed of trust, had a right to give the notice and make the claim to the property when seized by sheriff, is established by the decision in *State, to use, etc., v. McKellop et al.*, 40 Mo. 184; and the only question, therefore, is whether the new matter set up in the answer constituted a full and valid defense. It is true, there was evidence given going to show that the sale was fair and honest, but yet the pleadings did not deny the averment in the answer, and it is admitted that no change of possession followed the sale. This fact of itself, under our present statute, would make the sale void as to creditors, and the plaintiff does not set up any claim or assert any right in consequence of the second sale.

The retention of possession, however, does not avoid his right to recover under the deed of trust, for the statute expressly provides that where a mortgage or deed of trust on personal property is acknowledged or proved and recorded, the property may be retained in the possession of the mortgagor or vendor. The only issue presented is the right of the plaintiff to recover the debt secured by the deed of trust. The position is taken by the defendants—and we suppose it was upon that theory that the court at General Term acted—that the second sale to Peters constituted a merger of both titles in one, and that, as the second sale was void because no change of possession took place, therefore his rights under both claims were gone. But we can not assent to this doctrine. There is no question about the entire validity of the deed of trust. The debt secured by it was in full force and vigor.

Merger is the extinguishment, by act of law, of one estate in another by the union of the two estates. But even had the second sale been good and passed what rights Eichmann had remaining in him in the property to Peters, still it would not have amounted to a merger. The legal title was in the trustee, and the subsequent sale was only of an equity. Peters, if the sale had been good, would only have taken an equitable interest whilst the legal title was outstanding in the trustee. Under such circumstances it is obvious there could be no merger. Peters never claimed

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under the second sale, but relied wholly upon the first, about the validity of which there can be no doubt, and I think there can be no question as to his right to recover. This view effectually disposes of all the points made by the instructions.

It results, therefore, that the judgment of the General Term must be reversed and that of the Special Term affirmed. The other judges concur.

JAMES B. HILL *et al.*, Respondents, *v.* CHARLES MEYER *et al.*,
Appellants.

1. *Practice, civil — Pleadings — Note, motion for production of — Default for failure to answer, etc.* — In a mechanic's lien suit, plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note. *Held*, that a motion going to the merits of the petition should dispense with the necessity of answering till it is disposed of; but that such a motion was frivolous, and plaintiff was entitled to judgment notwithstanding for want of an answer.

If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper.

Appeal from St. Louis Circuit Court.

Crews, Letcher & Laurie, for respondents.

F. & L. Gottschalk, for appellants.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs filed their petition to enforce a mechanic's lien for lumber furnished to build a house upon the separate property of Catharine, the wife of Charles Meyer. They declare upon the account for the lumber, filing an itemized copy with the petition, but state that she closed the account by a note for the amount, "herewith filed," given by her husband as agent. The note was not filed, and defendant's attorney filed a motion for an order to file the note, but did not answer; and the case being continued

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some six months, a default was taken, the plaintiffs at the same time filing the note. The court overruled a motion to set aside the default, and defendant appeals.

The motion was a frivolous one, and was evidently intended for delay. (A motion going to the merits of the petition should dispense with the necessity of answering until it is disposed of.) But no fault was found with the petition; the note was not the foundation of the action, and need not have been named in it. Before the defendant could require its production he should have made an issue, and then, if an inspection of the note appeared to be necessary, he might present a petition under sections 36 and 37, or under section 40, ch. 169, General Statutes (Wagn. Stat. 1044-5), or he might have given notice to produce it at the trial, and, if not produced, might prove its contents. If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he ought not to be permitted to excuse himself by simply filing a motion in relation to such paper, but should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper. In the present case no defense was set up, the default was properly taken, and the judgment will be affirmed. The other judges concur.

ALEXANDER LAPEYRE, Respondent, v. GABRIEL PAUL *et al.*,
Appellants.

1. *Lands and land titles—Tenants in common—Adverse possession by one as against others—Limitations, statute of.*—One of a number of tenants in common took the sole possession of land and held the same continuously for more than ten years, claiming the same as his own exclusive property and taking the rents and profits to his own exclusive use. The other co-tenants were aware of his possession and his claim, but set up no claim to the adverse possession, and, on the contrary, manifested a perfect and entire acquiescence. *Held*, that in this State the co-tenant in possession will be considered as having created a statutory bar against the title of the others.
2. *Lands and land titles—Tenants in common—What act will show adverse possession by one against the others.*—The presumption of law is that the possession of one tenant in common is the possession of the co-tenants as well.

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Unity of possession is of the very essence of tenancy in common. Hence, in consequence of this legal presumption, to establish the title of one co-tenant against another, there must be on his part outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them.

Appeal from St. Louis Circuit Court.

T. T. Gantt, for appellants.

Ordinarily, the possession of one tenant in common is not adverse to his co-tenant. It may, however, become so, and does become so the moment there is an assertion of exclusive ownership on the part of the person in possession—the moment that he gives notice, expressly or impliedly, to the person *out* of possession that the possession held by him is of an adversary nature. And if, from that moment, the statutory period of limitations elapses before the assertion of the title of the holder of any undivided interest, such title is barred—is not held for him but against him; which is only saying that adverse possession for ten years bars a tenant in common as well as a stranger, or that a tenant in common is on the same footing as a stranger in respect to possession. Acquiescence in such a claim of exclusive ownership for the period of limitations is a complete bar to the subsequent assertion of the ousted tenant's title, though he was originally tenant in common. (See *Warfield v. Lindell*, 30 Mo. 282.)

J. C. Moody, for respondent.

I. The defendants and E. W. Paul being tenants in common, the possession of one was the possession of all in support of the common title, until an actual ouster be shown, or circumstances from which one can be inferred or presumed. Mere reception of all the rents, without any claim by E. W. Paul, or any declaration to him or others, will not be held sufficient to raise any presumption or inference of an ouster. Here, while the *onus probandi* is upon the defendants, there is no proof of any possession even adverse to E. W. Paul, no claim by him, and no

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exclusion of him, or declaration of any intention to exclude him; and his long-continued insolvency and the peculiar provisions of Therese C. Chouteau's deed explain this.

II. Seventeen years' quiet possession will not raise the presumption of an ouster. In a New York case quoted in *Warfield v. Lindell*, 30 Mo. 273, it was held that an exclusive possession for twenty-seven years was not sufficient to authorize the presumption of an ouster, even where there had been an actual resistance to plaintiff's entry and claim. (*Norwich v. Wright*, 24 Wend. 221.) In some of the cases quoted below it has been held that an occupancy by one joint tenant or tenant in common, and levying a fine, was not sufficient to raise the presumption of an ouster. In one case, I think in Pennsylvania, it was held that forty-six years was not sufficient without other circumstances. (See, generally, 5 Burr. 2604; 1 East, 277; Ang. Lim. 422-3; *McClurg v. Ross*, 5 Wheat. 124; *Warfield v. Lindell*, 30 Mo. 273; 38 Mo. 561; *Johnson v. Prewitt*, 22 Mo. 554; *Knowlton v. Smith*, 36 Mo. 507; *Cole v. Roe*, 39 Mo. 411; *Scruggs v. Scruggs*, 41 Mo. 242; *Doan v. Sloan*, 42 Mo. 106.)

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action of ejectment against Gabriel R. Paul and his tenants to recover a lot on Main street in the city of St. Louis. Both parties claim under a common grantor. The plaintiff claims to derive title by virtue of a sheriff's deed issued upon a judgment against Edmund W. Paul. The property had been conveyed originally to Rene Paul, father of the defendant, to the use of himself for life, with remainder to his seven children in fee. One of these children was a minor at the time of his death, which occurred in 1847 or 1848. Rene Paul died in 1851, leaving a will. From all his children except the minor, Rene Paul obtained in his lifetime quit-claim deeds conveying their estate in remainder in the property to him. Edmund W. was one of the children, and conveyed his estate in remainder. One-sixth of the remainder having vested in the minor, and remaining undisposed of, passed by inheritance to the remaining six children of Rene Paul. Edmund W., therefore, claiming

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through the deceased, would be entitled to one thirty-sixth of the remainder. Rene Paul having devised all his real estate to his executor, with power of sale, the property was put up and sold by the executor in 1853, and Gabriel R. Paul, the defendant, became the purchaser. The deed from the executor is dated January 19, 1853. It was in evidence that from the death of Rene Paul his executor was in the exclusive pernaney of the rents and profits; that from and after the date of the deed to him Gabriel R. Paul, the defendant, had continued, notorious, exclusive and open possession of the lot under the deed; that Edmund W. had lived all his life in St. Louis, and still lived there; that he made no claim to any part of the rents or profits of the lot; that he knew of the exclusive possession and claim of the lot by Gabriel R. during the entire time from 1853 to the commencement of the action—a period of about sixteen years—and acquiesced in it.

The cause was tried before the court without the intervention of a jury, and upon the foregoing facts the court declared the law to be that “if the court, sitting as a jury, shall believe from the evidence that after the death of Rene Paul the land in controversy was held in possession by the executor of Rene Paul, under his will given in evidence, until the same was sold and conveyed by the executor to G. R. Paul by the deed read in evidence, and that immediately upon the making of that deed the said G. R. Paul entered into possession thereunder of the land therein described, and has since that time to the commencement of this suit held possession thereof continuously, claiming the same as his own exclusive property and taking the rents and profits to his own exclusive use; that Edmund W. Paul was, at the time of the death of Rene Paul, living in the city of St. Louis, and has ever since lived here; that he was aware of the possession of the said land by G. R. Paul, as supposed in this instruction, and that the said G. R. Paul claimed the same as his exclusive property; that the said E. W. Paul acquiesced in said possession and claim by said G. R. Paul, and at no time prior to the commencement of this suit set up any claim to the said land, then the possession of the said land by the said G. R. Paul has

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ripened into a title as against the said E. W. Paul and those claiming under him."

The court then found a verdict for defendant, and rendered judgment thereon. This judgment was reversed at General Term, and defendant appealed the case to this court.

In some States it has been held that a sole possession by a tenant in common for a period covering the statutory limitation will constitute a bar. But this doctrine has not generally prevailed. It fails to notice the recognized distinction which exists between adverse possession in tenancies in common and any other case of adverse possession, as between strangers. The law on the subject of ouster and adverse holding by one tenant in common as against his co-tenant, was fully examined and the authorities reviewed by this court in the case of Warfield v. Lindell, 30 Mo. 272, and 38 Mo. 561.

There is a marked difference in the rules of evidence as applicable to a case of this kind, and to a case of adverse possession — a disseizin in general. The presumption of law is that the possession of one tenant in common is the possession of the co-tenants as well. Unity of possession is the very essence of a tenancy in common. That one tenant in common may disseize another is established beyond all doubt, but, in consequence of the legal presumption, acts of exclusive possession, which in case of a stranger would be deemed adverse and *per se* a disseizin, are, in cases of tenancies in common, susceptible of explanation consistently with the real title. They are not necessarily inconsistent with the unity of possession existing in such a case. It is for this reason that it depends upon the intent with which the acts of ownership are done, and upon their notoriety and essential character, whether they will be such as to break and dissolve the unity of possession, constitute an adverse possession as against the co-tenants, and amount to an ouster or disseizin. For this purpose there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them. (Warfield v. Lindell, *supra*,

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and cases cited.) It is not necessary that actual notice of an adverse holding and disseizin be brought home to the co-tenant; it is sufficient if the acts are overt and notorious; and then, if the co-tenants are ignorant of their rights or neglect them, they must suffer the consequences. Tested by these principles, we think that the instruction properly declared the law. The court, by its verdict, necessarily found the facts to be that immediately upon the making of the deed, G. R. Paul entered into the possession of the land, and has since held the possession thereof continuously, claiming the same as his own exclusive property, and taking the rents and profits to his own exclusive use; that E. W. Paul was aware of G. R. Paul's possession, and that he claimed the lot as his sole and exclusive property; that no claim was set up to the adverse possession, but, on the contrary, a perfect and entire acquiescence was manifested. The acts and possession of G. R. Paul were overt, notorious and adverse, as found by the verdict, and as they continued for more than a sufficient time to create a bar by the statute of limitations, they must be regarded as conclusive of the title.

It results, therefore, that the judgment at General Term must be reversed and the judgment of the Special Term affirmed. The other judges concur.

JOHN MARTIN *et al.*, Appellants, v. EDWARD LACHASSE *et al.*,
Respondents.

1. *Wills—Legacies—Survivorship—Death of legatee before that of testator—Lapse.*—A testamentary disposition will lapse by the death of the legatee during the life of the testator. But if a legacy be given to certain persons by name, and in the event of the death of either of them to the survivor, the alternative gift will take effect if the first legatee or devisee die even in the testator's lifetime.

Appeal from St. Louis Circuit Court.

P. C. Morehead and S. Simmons, for appellants.

I. The devise of the testator to his three sons became void on the failure of the contingency upon which it was predicated. As

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John died without issue before the testator died, and the devise was wholly dependent on his arriving at age, it could never take effect, and is void. And as the subsequent provisos are also wholly dependent on his arriving at age, the whole clause is void.

II. Even if John had any interest, when he died it lapsed. (1 Jarm. Wills, 300, and notes; 1 Rep. Leg. 320; 30 N. Y. 393; Lovel. Wills, 15 Law Lib., 3d series, 239.)

E. W. Decker and *N. A. Mortell*, for respondents, cited *Jones v. Waters*, 17 Mo. 589; *Chiles v. Bartleson*, 21 Mo. 344; 1 Jarm. Wills, 726; *Collins' Will*, 40 Mo. 321-7; 3 Coke, 19; *Goodtitle v. Whitley*, 1 Burr. 228; *Doe v. Underdown*, Willis, 293; *Doe v. Lea*, 3 Tenn. 41; 2 Redf. Wills, ch. 50, §§ 1, 4, 7.)

WAGNER, Judge, delivered the opinion of the court.

By the agreed statement of facts the only questions that can arise depend upon the construction to be given to the last will of John Lachasse, deceased. It seems that the testator, on the 30th day of August, 1841, was seized of and in possession of the tract of land or farm in controversy, and that on that day he made his last will and testament, which was duly probated after his death. He had eight children, three males and five females, all named in the will. The will is as follows: "First. I give and bequeath unto my wife all my estate, real, personal and mixed, to be managed for the good of her and my children, at her discretion, so long as she remains unmarried; and in the event of her marriage she is to take the sum of one hundred and fifty dollars for the one-ninth part of my estate, in money or personal property; and if she should not remain a widow, or live until my son John comes of age, at which time the farm is to be sold or divided in three equal parts between my three sons, viz: Edward, Archibald and John, admitting they should live; and if any of them should die, the surviving one or two of them shall receive the deceased's part or parts. Second. I give and bequeath to my daughter, Patsey Martin, the sum of ten dollars. Third. I give and bequeath to my daughter, Aurora Neil, the sum of ten dollars. Fourth. I give and bequeath to my daughter, Victory Hunt, the sum of ten dollars. Fifth. I give and bequeath to my

daughters, Amanda and Ellen, all my moneys and personal property at the death of my wife Mary, their mother, or, in the event of her marriage, to be equally divided between them; and if either of them should die, the surviving one to receive the deceased one's part."

John, the youngest child, died on the 8d day of June, 1842, being an infant aged about two years. The testator died on the 12th day of July, 1842, and the widow is still living and unmarried. The two boys, Edward and William A., the surviving devisees in the will, are now and have been in possession of the land, and this suit was brought against them in ejectment by some of the sisters claiming to be entitled to recover, as heirs at law, a proportional part of the share that was originally given to the infant John. It is contended that as John's death preceded that of the testator, his share lapsed and descended to the heirs without reference to the will.

It is a conceded principle, most clearly established, that a testamentary disposition will lapse by the death of the legatee during the life of the testator. And this rule equally applies to devises of real as to bequests of personal estate. This rule has been long settled and recognized (*Brett v. Rigdon*, Plowd. 340; 1 *Rop. Leg.* 320), and is often productive of hardship, and in some cases defeats the intention of the testator. But the doctrine will not be extended beyond cases falling strictly within it. Therefore, if a legacy or devise be given to one by name, and in the event of his death to another, the alternative gift will take effect if the first legatee or devisee die even in the testator's lifetime. This point was expressly adjudged in a very recent case (*Martha May's Appeal*, 41 *Penn. St.* 512). The law favors the vesting of estates, and will always hold them to vest, where it can be done consistently with legal principles and the manifest intent of the testator, in preference to declaring them lapsed. (*Collier's Will*, 40 *Mo.* 287.)

It is evident that the will can not be so construed as to mean that the devise of the farm to the sons and the survivor of them was dependent on the condition that John must reach the age of majority; and John having died before he reached that age, that

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in consequence thereof the estate did not vest. The provision simply goes to the postponement of the partition or sale until John, the youngest devisee, should arrive at age, for it declares that if either of the sons should die before that event, then the survivor or survivors should take the part or parts of the deceased. It seems to me that the language is clear and unmistakable, and that to give the will the construction insisted upon by the plaintiff would be contrary to sound legal principles and in opposition to the manifest intention of the testator. The will makes a disposition of the testator's whole estate. The land he clearly intended to give to his boys, and the survivor or survivors of them. To his three married daughters he gives the nominal sum of ten dollars each, and to the remaining two unmarried daughters he bequeaths all his personal property.

There is no general residuary devise or bequest, but there is a positive provision to prevent a lapse of the devise of the land, and to prevent a lapse of the bequest of the personalty, by directing that the survivor or survivors of the boys should take the land, and that the survivor of the two girls should take the personalty. The language is so clear and the intention is so plain that any other result would defeat the expressed object of the testator.

The court below found for the defendant, and its judgment will be affirmed. The other judges concur.

STATE OF MISSOURI, ON PETITION OF DANIEL G. TAYLOR, ADMINISTRATOR OF ABRAHAM H. LEE, DECEASED, Respondent,
v. THE ST. LOUIS COUNTY COURT, Appellant.

1. *Revenue—Taxes, assessment of by County Court—Certiorari will lie to review action of.*—The action of a County Court in assessing taxes upon property under the statute (Wagn. Stat. 1174, § 51) is clearly judicial, and hence the writ of *certiorari* will lie to review its action in this regard.
2. *Revenue—Bonds taxed according to the situs of the property, and not the domicile of its owner.*—Bonds of the "Masonic Hall Association" of St. Louis, in the hands of an administrator in St. Louis, are subject to taxation in this State, although the deceased owner of the bonds, at the time of his death, resided in Illinois, and the bonds had been once assessed in that

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State, and were only transferred to Missouri for the purpose of ancillary administration. The actual *situs* of personal property, and not the domicile of its owner, determines under the law of what State it shall be taxed. Section 24, page 115, Wagn. Stat., providing that real estate shall descend according to the laws of its *situs*, and personal property shall be distributed according to the laws of the domicile of the decedent, has no application to the case under consideration.

In no sense can it be said that the property represented by these bonds was in the possession of the foreign administrator; and it is immaterial that the bonds may have been transmitted from such foreign administrator for the purpose of ancillary administration.

Such bonds are not exempt from local taxation on the ground that the law makes no special provision for taxing such securities. Under our law, bonds are left to be taxed like other property where they can be reached, except that if the owner resides in the State they shall be taxed in the county of his residence. (Wagn. Stat. 116, § 9.)

Appeal from St. Louis Circuit Court.

L. Gottschalk, for appellant.

In *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, Judge Holmes lays down this general rule: "The personal property of a non-resident, actually situated in another State, is not to be assessed and taxed against him in this State; but the property of either a resident or a non-resident is taxable here if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or of his agent." (*Maltby v. Reading & Columbia R.R. Co.*, Am. Law Reg., N. S. 479; 52 Penn. St. 140; *Hood's Estate*, 9 Harris, 114; *West Chester School District v. Darlington*, 2 Wright, 157.) In *Faxton v. McCosh*, 12 Iowa, 527, it is held that "the interests represented by the shares of stock in a railroad company, organized under the laws of this State, are within the jurisdiction of the State, even when the owners thereof are non-residents, and, as such, taxable here." (*The People v. Home Ins. Co.*, 29 Cal. 533; *The People ex rel. Jefferson v. Gardner et al.*, 51 Barb. 352; *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224; *People ex rel. Kennedy v. Commissioners of Taxes*, 35 N. Y. 423, 440-1; *Finley v. City of Philadelphia*, 32 Penn. 381.) There is nothing poetical about tax laws. Wherever they find property they claim a contribution for its protection without any special respect to the owner or his

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occupation. (Catlin v. Hull, 21 Verm. 152; City of Albany v. Meekin, 3 Ind. 481; Wilkey v. City of Pekin, 19 Ill. 160; Mills v. Thornton, 26 Ill. 300; Sangamo & M. R.R. Co. v. County of Morgan, 14 Ill. 163; Johnson v. City of Lexington, 14 B. Monr. 648; Sprague v. Lisbon, 30 Conn. 19; Faxton v. McCosh, *supra*; People v. Home Ins. Co., 29 Cal. 533.)

Whittlesey, for respondent.

I. The statutes do not require that debts due by citizens of this State to non-resident creditors should be listed for assessment and taxation. In the first place, the general provisions of the statute apply only to our own citizens, by requiring them to return to the assessor the list of their property subject to taxation. (Gen. Stat. 1865, ch. 12, §§ 9-12, 23-5; *id.*, ch. 11, §§ 1, 6; Wagn. Stat. 1166-9; *id.* 1161, § 9.) By the statute (Gen. Stat. 1865, ch. 11, § 6; Wagn. Stat. 1161, § 9) personal property is to be assessed in the county of the owner's residence; not *in loco rei sitæ*. (Gen. Stat. 1865, ch. 11, § 4; Wagn. Stat. 1161, § 7; see also form of oath to be taken by persons returning lists of taxable property, Gen. Stat. 1865, ch. 12, § 12; Wagn. Stat. 1167, § 12; see also R. C. 1855, p. 1232, § 1.) The object of the statute and of all its provisions looks to the assessment of taxes upon the resident citizen. If the owner of property is not a citizen, nor residing here, he can not make return nor take the oath, and the statute does not require it nor contemplate any such proceeding. If goods and chattels are found here, the person having them in charge is to make return to the assessor, for they have an actual potential existence here—an actual *situs*. But debts have no *situs*. They are intangible, and it is not to be presumed that debts due non-resident creditors are to be assessed without express provisions for their assessment and the collection of the tax. If the State had intended to tax all the bonds issued by railroad corporations, counties, banks, etc., when owned by citizens of other States or aliens, would not the statutes have so said in express terms? It taxes the stock of corporations to the owners of the shares, or taxes the property of the corporations as such; but it

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nowhere purports to tax the bonds of such corporations as such, nor when held by aliens or non-residents. To tax the shares and the bonds would be double taxation, which is not to be presumed. Provision is made for taxing stocks, etc. (Wagn. Stat. 1169, §§ 23-25), to the owners thereof, and the tax is to be paid by the company (§ 24). Again, no provision is made for collecting the taxes against the non-resident creditors. The collector, before he can levy, must make demand of the party liable personally, "or by visiting his place of abode for that purpose." (Wagn. Stat. 1188, § 26; Gen. Stat. 1865, ch. 135, § 26.) No demand can be made of a non-resident creditor. Special provision is made for non-resident owners of lands, requiring the collector to furnish, upon request, a statement of the taxes assessed (Wagn. Stat. 1187, § 24; Sess. Acts 1868, p. 416); but there is no such provision for taxes upon bonds or notes held by them or debts due them. Money lent or payable in a city could not be assessed and taxed against a non-resident creditor. (St. Paul v. Merrill, 7 Minn. 258.) The personal property of an intestate is to be taxed at his domicile, and not at the domicile of his personal representative. (Stephens v. Boonville, 34 Mo. 323.) That in the hands of a guardian is not taxable at the residence of the guardian, but at that of the ward. (School Directors v. James, 2 Watts & Serg. 568; Carlisle v. Marshall, 36 Penn. 397; West Chester School District v. Darlington, 38 Penn. 157; Spangler v. York, 13 Penn. 327; Hood's Estate, 31 Penn. 106.) The Pennsylvania cases assert the same principle as that of Stephens v. Boonville, 34 Mo. 323, but show an express provision taxing non-residents for some purposes; but in this State there is no express provision for that purpose. (Johnson v. Lexington, 14 B. Monr. 648.)

The defendant relies upon the Wiggins Ferry case, 40 Mo. 580; but there the company was treated as domiciled here, and its property as situate here. The statute has changed that. (Wagn. Stat. 1171, §§ 2, 3; Sess. Acts 1868, p. 144.)

II. The death of the foreign creditor or bondholder, and the taking out ancillary letters of administration in this State, do not make these bonds taxable in this State as property in the hands

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or in charge of the administrator. The administrator is not the owner of the bonds; he is but a trustee for the next of kin in Illinois, or, rather, for the administrator in that State, for to him the proceeds are to be remitted for distribution in accordance with the law of the domicile of the intestate. (See 32 Mo. 431.) For this ancillary administration our statute has made special provisions. (Wagn. Stat. 115, §§ 24-31.) The bonds belong to the foreign administrator, and he paid the tax at the domicile of the deceased. He must return them for taxation there, and must return the interest for the United States income tax. Moneys of a non-resident beneficiary are not to be taxed to a trustee at the place of his residence, except by special statute expressly so declaring. (Carlisle v. Marshall, 36 Penn. 397.) Trust funds are to be taxed at residence of the beneficiary. (*In re Kellinger*, 9 Paige Ch. 62; see Pennsylvania cases cited above; 2 Watts & Serg. 568; 38 Penn. 157; 13 Penn. 327; 21 Penn. 106.) We do not deny the power of the State. We only say that it has not by its laws attempted to tax debts due foreign creditors, and that the necessity of administering here does not give a local *situs* to these debts; they follow the domicile of the owner, the intestate. (Spraddling v. Pipkin, 15 Mo. 118; State, to use, etc., v. Campbell, 10 Mo. 124; Abbott v. Miller, *id.* 141; St. Paul v. Merrill, 7 Minn. 258.) Chattels have a local *situs*, debts have none.

The foreign administrator of a foreign creditor can not sue in our courts. He must procure some citizen of this State to take out letters, and then must turn over the choses in action to the ancillary administrator. (Naylor v. Moffatt, 29 Mo. 136; Williams v. Storrs, 6 Johns. Ch. 353; Rightmeyer v. Raymond, 12 Wend. 51.) Because the foreign administrator must thus be aided by the ancillary administration of this State, will it be presumed, when there is no express provision of the statute, that the choses in action, which must perforce be brought into this State for collection, become subject to taxation when they would not have been so if the intestate had lived? Does the death of the creditor put upon his assets the burden of a taxation additional to that of his domicile? The principle asserted in *Stephens v.*

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Boonville, 34 Mo. 323, would affirm a contrary doctrine. In this case the administrator in Illinois had paid the tax for the same year for which the assessment complained of was made.

BLISS, Judge, delivered the opinion of the court.

The relator sued out of the Circuit Court of St. Louis county a writ of *certiorari* directed to the County Court, for the purpose of reviewing their action in assessing taxes upon property belonging to the estate represented by him. The proceedings were reviewed and the assessment set aside, whereupon the defendant appeals.

Counsel for appellant first contends that the writ will not lie to an action of this kind. The County Court of each county is directed (Wagn. Stat. 1174, § 51) to hear and determine allegations of erroneous assessment or mistakes in favor of those who have failed to go before the board of appeals, and the action of the court in the matter is clearly judicial in its character, and has always been so considered. This writ will therefore lie to review its action. (Marion County v. Phillips, 45 Mo. 75; In the matter of the Saline County Subscription, *id.* 52; St. Louis Mutual Life Ins. Co. v. Charles, *ante*, p. 462.)

The plaintiff showed to the County Court that the deceased was, at his death, a resident of Illinois; that he owned bonds due by the Masonic Hall Association of St. Louis, which were listed and taxed at his domicile in Illinois; that ancillary administration was taken out in St. Louis upon so much of the estate as is embraced in these bonds, and that the bonds were transferred to the possession of the St. Louis administrator for the purpose only of ancillary administration; yet the court held that these bonds, being actually in the hands of the St. Louis administrator, as belonging to the Missouri estate, were subject to taxation in St. Louis. The correctness of this decision is the only question for consideration.

Our statute makes no special mention of this description of property, but provides (Wagn. Stat. 1159, ch. 11, § 1) that taxes shall be levied "on all property, real and personal, except," etc. Sections 7 and 8 exempt certain classes of notes

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and bonds, but the exemption does not cover those in controversy. The county authorities defend their assessment, as we have seen, upon the ground that these bonds are actually within the State and subject to its laws, while the relator claims that as personal property, and especially as choses in action, they follow the domicile of the owner, and can only be taxed at the place of such domicile.

It is evident they should not be assessed in both States, though an erroneous assessment in one State will not exempt them from a correct one in the other. We have no statute specially subjecting to taxation the bonds of our corporations wherever owned, and if they are liable at all, it is because they are here protected by our laws, and subject to the jurisdiction of our courts.

That the *situs* of personal property is the domicile of its owner, is a fiction, though color is given to its truth by the law in relation to the distribution of personal estates. If a citizen and resident of St. Louis own a farm in Illinois, no one pretends that the farm has any different location than if the owner lived upon it. But how with the cattle in its fields and stables, and the corn in its granaries? On what principle can they be said to belong to Missouri, so long as they are upon the farm? There is this difference: they can be removed to Missouri, while the farm can not; but, until removed, their *situs* is the farm; they help to swell the wealth of the locality; they are protected by its laws, and should be subject to its burdens. The same rule should be applied to bonds and notes, though from the different nature of the property their actual *situs* may be more doubtful. But, if it be established, although not the residence of their owner, the same result should follow as to them. Thus, if money be left by a non-resident in the hands of an agent for investment and loan, the money itself, the instruments taken for it, and the various forms which it assumes, so long as they remain in the hands of such agent, are local property, and upon every principle should be subject to the public burdens imposed upon other local property of the same kind. What difference does it make in the benefits derived by the owner from the protection afforded this property by the administration of the law, whether he live

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near it or abroad? or what difference in the expense of such protection?

This view has been recognized by all the courts, but I will refer to only a few cases. In *Catlin v. Hall*, 21 Verm. 152, one Hammond was a resident of New York, and had placed promissory notes in the hands of the plaintiff in Vermont as his agent, to collect, re-loan and manage for his benefit. They were assessed at the locality of the agent, and he brought suit to test the legality of the assessment, which was fully sustained by the court, upon the principle that the property was invested in the State, under the protection of its laws, and should contribute to the support of the government which protects it. In *The People v. Home Ins. Co.*, 29 Cal. 533, certain State bonds had been deposited by the defendant, a foreign corporation, as security for its liabilities, and were subjected to local taxation. The assessment was sustained, the court holding "the actual *situs* and control of the property within the State to be the condition which subjects it to taxation." The case of *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, arose out of an attempt to assess taxes against the owner, who was a resident of New York, upon his personal property in New Orleans. The Court of Appeals held the assessment as to tangible property to be illegal, but declined to give an opinion in regard to choses in action. But in the Supreme Court, in *The People v. Gardner*, 51 Barb. 352, it was held that a resident of New York was not liable to be assessed and taxed at his residence upon securities taken and held by his agents in other States. This court, so far as the question has come before us, has sustained the same view; and in *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, Judge Holmes thus states the general doctrine: "The property of either a resident or non-resident is taxable here if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or of his agents."

The only question, then, to be determined is whether the bonds belonging to the relator as administrator are so located in Missouri as to be taxable here, or whether they should be assessed at the residence of deceased. The fact that they have been once

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assessed at the latter place cuts no figure, for the authorities at the true *situs* can not be thus deprived of jurisdiction.

In regard to the law governing the disposition of the property of a deceased person, our statute provides (Wagn. Stat. 115, ch. 125, § 24) that real estate shall descend according to the laws of its *situs*, and that personal property shall be distributed according to the laws of the domicile of decedent—thus embodying the existing law rather than declaring a new rule. This provision, it is claimed, should govern the location of the personal property of the estate for the purpose of taxation. If so, the rule should apply to all kinds of personal property, so that cattle, horses, steamboats, and buildings upon leased ground that may never have been within the jurisdiction of the State containing the domicile of decedent, could be alone taxed at that place. But the law upon this subject has no application to the question under consideration. In fixing the rights of distributees of property whose *situs* is changeable, and may be under one jurisdiction at one time and elsewhere at another, the law of some locality must be chosen, and it is very proper to govern its distribution by the law known to the deceased. But the principles governing the question of taxation are, as we have seen, very different, and we are only required to ascertain the actual location of the property at the time of its assessment.

Administration of so much of the estate of a non-resident as is found within our jurisdiction is ancillary, in that it becomes the duty of the administrator to transmit to the representative of the estate of the domicile any balance remaining after full administration. Yet so far as local creditors and local distributees are concerned, the administration is complete. Until such balance be transmitted the local administrator has full possession of all the property, and the foreign administrator has no right to interfere. In no sense can it be said to be in the possession of the foreign administrator, and it does not matter whether or not it may have been transmitted, or rather the evidence and representation of it, in the shape of bonds and notes, from such administrator to the local one. When transmitted for the purpose of administration, it becomes a local estate, it comes within the

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jurisdiction of the tribunals of the domicile of the local administrator, it seeks the protection of its laws and the enforcing process of its courts, and until the closing up of the local administration it can have no other *situs*.

Counsel for relator claims exemption of these bonds from local taxation because the law makes no special provision for taxing such securities, as is made by the Pennsylvania act under consideration in *Maltby v. Reading & Col. R.R. Co.*, 52 Penn. St. 140, to which case we have been cited by appellant. In order to reach all the bonds of a corporation, if the policy were to assess them for taxation without reference to where they were held, a similar provision would be necessary. We have made such provision in relation to the stock of corporations, but leave bonds to be taxed like other property where they can be reached, except that if the owner resides within the State they shall be taxed in the county of his residence. (Gen. Stat. 1865, ch. 11, § 9; Wagn. Stat. 1161.)

The oath required of tax-payers by section 12, chapter 12, Gen. Stat. 1865 (Wagn. Stat. 1167), expressly requires the disclosure of property like that under consideration. "You do solemnly swear [or affirm] that you have given a true and correct list of all taxable property, including therein money, notes or bonds in hand or on deposit, owned by you, or under your charge or management," etc. The fact that the property is held in trust creates no exemption, nor does it change its *situs*. We are referred to *Stephens v. Mayor, etc.*, 34 Mo. 323; and it is true that within the State personal property is required by statute to be assessed at the domicile of the owner, and that statutory provision would be sufficient to justify the conclusion in the case cited, without claiming the proposition to be a general one.

I am of opinion that that part of the estate of decedent in the hands of the Missouri administrator is properly subject to taxation in this State, and not elsewhere, and that the judgment of the Circuit Court reversing the order of the County Court should be reversed. The other judges concur.

THE STATE OF MISSOURI, Defendant in Error, v. GEORGE SLOAN, Plaintiff in Error.

1. *Criminal law — Homicide — Indictment — Threats and admissions of deceased, when admissible as res gestæ.*—In the trial of an indictment for murder, threats by the deceased against defendant, which were frequent and continuous down to the time of killing, and all blended together and inseparable, would be considered as a part of the *res gestæ*, and evidence touching them would be admissible to explain the act and show whether defendant acted in necessary self-defense. And testimony of the deceased, immediately after the tragedy, exculpating defendant, would be admissible on the same principle.
2. *Homicide — Killing on apprehension of bodily harm.*—Where one apprehends great bodily harm from another and there is reasonable ground to believe that such harm is imminent, he may safely act on appearances, and even kill the assailant if necessary to avoid the danger. And the killing would be justifiable, though it afterward turn out that the appearances were false—that there was, in fact, neither design to do him serious injury nor danger that it would be done. But he must decide at his peril on the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review.
3. *Manslaughter, instruction as to.*—Under indictment for murder, an instruction that defendant may be convicted of manslaughter should define the latter crime.
4. *Criminal law — Manslaughter in first degree implies something more than intentional violence.*—In order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that defendant was committing or attempting to commit some other offense than that of intentional violence upon the person killed.

S. M. Chapman, for plaintiff in error.

I. It was error to exclude evidence of Moore's threats and conduct before the affray, and in holding that all threats and demonstrations made by him more than three days before the affray were too stale to be given in evidence, although communicated before the shooting; and that all such as had not been communicated were inadmissible, however recent. (*Campbell v. People*, 16 Ill. 17; *Dukes v. State*, 11 Ind. 557; *Cornelius v. Commonwealth*, 15 B. Monr. 539; *Howell v. State*, 5 Ga. 54-5; *Keener v. State*, 18 Ga. 224-9; *Lingo v. State*, 29 Ga. 484; *Stewart v. State*, 19 Ohio, 306; *Pitman v. State*, 22 Ark. 356, and cases cited; *Dupree v. State*, 33 Ala. 380; *Howell v. State*,

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5 Ga. 54; Monroe v. State, 5 Ga. 85, 121; Cornelius v. Commonwealth, 15 B. Monr. 539; Roscoe's Crim. Ev., 6th ed., 710.) The cases of The State v. Jackson, 17 Mo. 544, and State v. Hays, 23 Mo. 287, are not in point.

II. Defendant had tried to avoid his adversary, but all to no purpose; and when he saw the danger imminent, he was justified in acting more promptly in his defense, and upon less demonstrations of hostility, than though his fears had not been aroused by Moore's threats and prior conduct. (State v. Hicks, 27 Mo. 588; People v. Rector, 19 Wend. 569; Selfridge's Trial, 160; Phillips v. Commonwealth, 2 Duvall, 328; Pattison v. People, 46 Barb. 625; Granger v. State, 5 Yerg. 459; 1 Bish. Crim. Law, § 384; Young v. Commonwealth, 6 W. P. D. Bush, 312; Campbell v. People, *supra*; 2 Whart. Crim. Law, 4th ed., § 1027, note; Howell v. Commonwealth, 2 Duvall, Ky., 228.)

III. The court should have admitted evidence of Moore's declarations to his surgeons, while engaged in extracting the ball and dressing the wound, made immediately after the affray, "that Sloan was not in fault, that he had drawn on the difficulty by attacking him," as part of the *res gestæ*. (Commonwealth v. McPike, 3 Cush., Mass., 181; King v. Foster, 6 Car. & P. 325; Aveson v. Kinnaird, 6 East, 197; Travelers' Ins. Co. v. Mosley, 8 Wall. 397; Rawson v. Hugh, 2 Bing. 104; Starkie's Ev., Sharswood's ed., 89; People v. Durant, 13 Mich. 351; Marr v. Hill, 10 Mo. 320; Walde v. Perryman, 27 Mo. 279; Hanover R.R. Co. v. Coyle, 55 Penn. 396.)

IV. 1. The court erred in instructing the jury upon the law of manslaughter in the first degree, there being in the case no evidence tending to show the defendant guilty of that offense. (Franz v. Hilderbrand, 45 Mo. 121; Webster College v. Taylor, 35 Mo. 268; Harper v. Indianapolis & St. Louis R.R. Co., 44 Mo. 488; State v. Rose, 32 Mo. 346.) It was the duty of the court to declare the law as applicable to the grade or grades of homicide which the evidence tended to prove, and to have confined its instructions to such grade or grades. (State v. Rose, 32 Mo. 346; State v. Jones, 20 Mo. 58, 64; State v. Dunn, 18 Mo. 419; State v. Jecko, 44 Mo. 234, 236.) 2. The court should,

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after instructing the jury that they could convict for manslaughter in the first degree, have declared the law defining that offense, as requested by the defendant, that "manslaughter in the first degree, as applicable to this case, is where the killing is without a design to effect death, by the act, procurement or culpable negligence of the defendant while engaged in the perpetration or attempt to perpetrate a crime less than a felony." It is said by the court in *Crawford v. State*, 12 Ga. 142: "Whenever there is any doubt as to the grade of the offense, it is the duty of the court clearly and distinctly to instruct the jury as to the law defining the several grades of homicide, and then to leave them to find from the evidence of which particular grade the defendant is guilty." (See *Davis v. State*, 10 Ga. 109.) The jury was, in this case, in substance, instructed that they could convict for manslaughter in the first degree; but an instruction asked by the defendant defining that offense was refused. This was error. This instruction, which was asked by the defendant to meet the effect of the one given for the State, embodied a correct exposition of the law of manslaughter in the first degree, as applicable to the facts of this case, and should have been given, so far as it related to that offense, whatever may be thought as to the technical accuracy of some other portions of the instruction. 3. The court should have instructed the jury as asked by the defendant upon the law of self-defense and justifiable homicide. Upon the law defining justifiable homicide the defendant requested the court to declare that "homicide is deemed justifiable when committed in resisting an attempt to kill such person, or when committed in his or her lawful defense, when there shall be reasonable cause to apprehend a design to do him or her some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished. And in deciding the degree of homicide to be imputed to the defendant, and whether he had or had not reasonable cause to apprehend such immediate danger to exist at the time of shooting, all the circumstances connected with the shooting, together with the conduct and situation of the deceased at the time, and immediately prior thereto, are proper subjects for the consideration of the jury."

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(See Wagn. Stat. 446, § 4.) This instruction was important to have enabled the jury to determine whether the homicide for which the accused was on trial was not by the evidence brought within the pale of justifiable homicide, and should have been given, although some of the language used may not have been the most appropriate or happy.

Leonard, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Circuit Court of Dunklin county for the murder of one Charles A. Moore. The indictment was in the usual form for murder in the first degree, and a change of venue having been awarded to Cape Girardeau county, a trial was there had, and he was convicted of manslaughter in the first degree.

The exclusion of evidence offered by the defendant, the giving and refusing of instructions and the finding of the jury are the matters complained of.

The evidence shows that Moore, the deceased, entertained the greatest ill-feeling toward the defendant, whom he accused of slandering him; that he had made threats on various occasions that he would kill him; that he commenced to make these threats some weeks before, and continued to make them to within less than an hour of being shot, when he stated, while belting on his pistol and going in the direction of the defendant, that he "was going to kill George Sloan." At the time of the killing the defendant had just come to town, and Moore immediately sought him out, and got into an altercation with him; the defendant started to leave, and Moore followed him with his revolver buckled on his person; defendant then turned round, saying to Moore, "don't follow me," and immediately fired the shot from the effects of which Moore died in a few days thereafter.

The court rejected all the evidence of threats made by the deceased more than three days previous to the shooting as being too stale and remote, and also refused to admit in evidence those threats which had been made just prior to the killing, and which had not at that time been communicated to the defendant. What

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length of time must elapse after threats are made, and under what circumstances they are to be received in evidence, is not very definitely fixed or clearly settled.

In *The State v. Jackson*, 17 Mo. 544, it was held that evidence of threats was not admissible if sufficient time had elapsed for the blood to cool. But that case is so entirely different in its features from this that it can be regarded as of very little authority here.

In the case of *The State v. Hays*, 23 Mo. 287, it appeared from all the evidence that the prisoner was the aggressor, and had sought the difficulty in which the deceased was killed. This court refused to reverse the judgment of conviction for murder, because the court below rejected evidence of threats made by the deceased against the prisoner, the records not showing whether the threats were recent or of long standing.

Of the propriety and justice of the decision upon the facts as developed in that case, there can be no doubt. At what time the threats were made did not appear, and the murdered man was not trying to execute his threats, or commit any offense, when the prisoner met and killed him. A threat antecedently made would of course furnish no justification or palliation for a homicide under such circumstances. The books contain examples in which the threats of the deceased party have been given in evidence, and there are also cases in which such threats have been rejected. But where such threats have been received they were generally recent, or continued down, so as to become very nearly coeval with the killing, and were brought home to the knowledge of the party slaying. (See *Levin's C. C.* 184; *Rosc. Crim. Ev.* 772; *Rector's case*, 19 *Wend.* 569.) But the judge who delivered the opinion of the court in *Hays' case* distinguishes it from that class of cases where the threats are made and continued down to the time of the killing. Thus, in speaking of the case of *Monroe v. State*, 5 *Ga.* 85, 135, 136, he says: "In the case of *Monroe v. State of Georgia*, the facts were widely different from the facts in this case. There the threats against the life of Monroe, coupled with the acts of Macon, were brought down to the time of killing. The deceased, at his death, was armed with a yaeger

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and two pistols; he had been watching and seeking the opportunity to kill Monroe. He had created such a dread of losing life in Monroe's mind that, although a physician, he was compelled to practice his profession by visiting his patients in the night-time. Here the threats by Macon against Monroe and the acts of Macon, of one continued hostile series down to the death, were important evidence to explain the killing on the part of Monroe. In the case from Georgia, Meade's case and Rector's case are quoted and relied on as authority. This kind of evidence is permitted by the court in Georgia, to show the reasonableness of the defendant's fears. In the case from Georgia the testimony proved a continued series of threats, accompanied by acts of violence from the deceased toward the prisoner, commencing some months previously, and coming down to the time of killing, and all showing a determination on the part of the deceased to take the life of Monroe before the next ensuing term of one of the courts of the county where the transaction happened. I repeat that the case at bar differs widely from the case of Monroe just cited from 5 Ga."

The facts in the case from Georgia are almost identical with the case we are now considering. The deceased, Moore, at a party, had sought a personal difficulty with Sloan, which Sloan shunned. Two or three days before the shooting, and again on the day before, he threatened to kill Sloan the "first time he saw him;" that on the occasion last referred to he stated that he "intended to kill him the first time he saw him, as he was nobody but a God-damned Yankee, and should not associate with white folks," and this was communicated to Sloan before the affray. It appears also that when the defendant was in the store Moore came to the door with a revolver, looked in, and requested the proprietor to shut up his store, as he "expected that he and Sloan would have a difficulty, and he did not wish to have it in his house." This remark of Moore the court excluded because it was not communicated to the defendant. In an analogous case in the State of Illinois this same question arose, and the court there held that the evidence was admissible. The court remarks: "Upon the trial the

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defense offered to prove that on the day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct toward the prisoner at the time of their meeting and of the affray. If he had threatened to kill, maim or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hand—that he had attempted to accomplish his declared purpose; and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant, if necessary. While the threats of themselves could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony in making out a case of necessary self-defense. The evidence offered was proper, and should have been admitted.” (Campbell v. People, 16 Ill. 17.)

In the present case the evidence was highly important and proper to illustrate and explain the character of the act. The threats were continuous and frequent, they were all blended and inseparable; and the last threat, when the deceased had his revolver with him, showing an ability to carry out and accomplish his purpose, went to form a part of the *res gestae*, and must be considered as of the same transaction. They were therefore all admissible in evidence together, not to justify or exculpate the slaying, if it should be found that the defendant was the assailant, but as circumstances to explain the act, and show whether the defendant acted in necessary self-defense.

Defendant proposed to prove that whilst the surgeons were dressing the wound, and immediately after the shooting took place, Moore, in speaking about the matter, said that “Sloan was not in fault, that he had drawn on the difficulty by attacking him, and that if his pistol had not hung when he went to draw

it he would have killed him." This declaration was excluded by the court on the ground that it was no part of the *res gestæ*, and was not shown to have been made *in articulo mortis*.

In *McMillen v. The State*, 13 Mo. 30, it was proposed to prove by the witness that she had heard Jackson Logsdon, the deceased, recently before the affray threaten to shoot one of the defendants. The testimony was rejected. Judge Napton, writing the opinion of the court, says: "As Jackson Logsdon was not a party to the prosecution, what he said is no more than the hearsay of any other man, and was therefore upon general principles inadmissible. Had his declarations been *in articulo mortis* or a part of the *res gestæ*, they would have come within the exceptions to the general rule. The bill of exceptions does not show *when* the declarations were made. 'Recently' is a word of indefinite character." Here it is admitted that if the threat had been made at the time the crime was committed, or so soon thereafter as to have made it constitute a part of the *res gestæ*, it would have been properly receivable. The question was directly presented to this court for adjudication in the case of *Brownell v. The Pacific R.R.*, *ante*, p. 239. There the point raised was in reference to the admission of the declaration of Brownell, the deceased, as to how the accident happened. This declaration he made immediately after the accident, and upon a review of the authorities we held the declaration admissible as constituting a part of the *res gestæ*.

The ruling in that case is decisive of this, and there is no necessity for repeating the reasons for the conclusion we there arrived at. The evidence was admissible, and the court erred in rejecting it.

We will not enter upon an examination of the instructions in detail, but only refer to one or two given for the prosecution. The tenth instruction given for the State, in reference to the law of self-defense, is objected to and complained of by the defendant. The instruction, though unhappily and inartistically drawn, is substantially correct. It is in accordance with the doctrine laid down by the best elementary writers, and has been constantly acted upon and enforced by the courts.

When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and even kill the assailant if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false, and there was, in fact, neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at his peril of making that guilt, if appearances prove false which would be innocence had they proved true. (*Shorter v. The People*, 2 Comst. 193; *Campbell v. The People*, *supra*.)

On the trial of Thomas O. Selfridge, Judge Parker, afterward Chief Justice of Massachusetts, puts this case as an illustration: "A., in the peaceable pursuit of affairs, sees B. walking rapidly toward him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the instant the pistol is discharged, and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." Upon this case the judge inquires, "will any reasonable man say that A. is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such a doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defense; and when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable ground of his apprehension, no danger can be supposed to flow from this principle." The judge had before instructed the jury that "when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should

afterward appear that no felony was intended." (Selfridge's Trial, 160.) Any other doctrine would destroy the right of self-preservation, and impose a burden which would render persons in dangerous positions powerless to protect themselves.

Our statute has placed killing in self-defense under the head of justifiable homicide, and hence the common-law rule applies in the fullest extent. The law as announced by Judge Parker is of ancient origin. The principle was recognized and acted upon in Levett's case, recited by Jones, J., in Cook's case (Cro. Car. 538), to the following effect: Levett was in bed with his wife and asleep, in the night, when the servant ran to them in fear, and told them that thieves were breaking open the house. He arose suddenly, and, taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife, espying some one whom she knew not in the buttery, cried out to her husband in great fear, "Here they be that would undo us." Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and, thrusting with his rapier before him, killed Francis Freeman, who was lawfully in the house and wholly without fault. On these facts, found by special verdict, the court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here the defendant acted upon information and appearances which were wholly false; and yet, as he had reasonable ground for believing them true, he was held guiltless.

Roscoe, in his work on Criminal Evidence, says it is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified. (Roscoe's Crim. Ev. 639.) The books give numerous examples, and apply the principle approvingly. (1 Hale, P. C., 42, 474; Hawk., P. C., Curwood's ed., 84; 1 East, P. C., 575; 1 Russell on Crimes, 549-50.)

The eleventh instruction given for the prosecution stated that when a party was indicted for murder he might be convicted of manslaughter, and if the jury believed from the evidence that

Sloan was guilty of manslaughter in the first degree they might assess his punishment at imprisonment in the penitentiary for a term not less than five years; if in the second degree, for a term not less than three years nor more than five years. Here the court does not undertake to define what it takes to constitute manslaughter in the first degree, the offense of which the jury found the defendant guilty. The jury were palpably misled as to the ingredients of manslaughter in the first degree.

If the killing constituted an offense, it was either murder in the first degree or some of the lesser grades of homicide; but certainly it could not be brought under the definition of the first degree of manslaughter. There was not a scintilla of evidence going to show that that offense was committed.

Manslaughter in the first degree, under the statute, is "the killing of a human being without a design to effect death, by the act, procurement or culpable negligence of another while such other is engaged in the perpetration or the attempt to perpetrate any crime or misdemeanor not amounting to a felony, in cases where such killing would be murder at the common law." (1 Wagn. Stat. 446, § 7.)

It would seem to be plain, from the reading of this statute, that in order to convict the accused of manslaughter in the first degree he must be engaged in committing some other offense besides violence upon the person killed. Upon a statute defining manslaughter precisely as ours, the question came up for determination in the Supreme Court of the State of New York. The prisoner was indicted for killing his wife. At the trial the court charged the jury that if they were satisfied from the evidence that the deceased had come to her death by reason of blows or injuries inflicted upon her by the defendant, not in any self-defense, or otherwise excusably or justifiably, they should find the defendant guilty of manslaughter in the first degree. The charge was held to be erroneous, and the conviction was reversed. In the appellate court the judge said: "If the prisoner killed his wife by violent means (and he must have done so, if at all) no doubt he was engaged in the perpetration of an assault and battery, which is a misdemeanor. But that was part of the act itself which con-

stituted the principal charge. The statute evidently contemplated some other misdemeanor than that which is an ingredient in the imputed offense, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholly nugatory. Where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offense. Derivative character must necessarily spring from a distinct, although it may be connected, source. I agree with Judge Bronson in thinking that in order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that the accused was committing or attempting to commit some other offense than that of intentional violence upon the person killed. (*The People v. Butler*, 8 Parker's Crim. Rep. 377; see also *The People v. Sheehan*, 49 Barb. 217; *The People v. Rector*, 19 Wend. 605.)

Upon an indictment for murder in the first degree the accused may be convicted of any lesser grade of homicide, but the conviction must be based on some degree which the evidence shows he is guilty of.

It follows, therefore, that the judgment must be reversed and the cause remanded for a new trial. The other judges concur.

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A

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ADMINISTRATION.

1. *Administration—Sale without order of court—Receipts, evidence touching.*—In suit brought against the sureties on the bond of an administratrix for failure to account for and pay over the assets of the trust estate, evidence showing the sale of the estate and amount of proceeds received would be competent, although it further appeared that the sale was without the order of court and unauthorized; and she should be charged with the amount so received.—State, to use of Pepler, Adm'r, v. Scholl, 84.
2. *Administrator—Bond—Act of January 12, 1869, not void because it failed to require bond, etc.*—The act of January 23, 1859, amendatory of that of February 9, 1857, authorizing William C. Boon, as administrator, to sell the estate of Watts, deceased, for the benefit of his heirs, did not require him to give a new bond; nor was it void because it failed to require his bond; nor was his authority to sell under the act unwarranted because it failed to show that the heirs were minors. It was not necessary that the act should show their disability. If the persons whose property was sold were in fact minors at the time of the sale, that fact made the authority complete.—Garnett v. Leonard, 205.
3. *Wills.*—A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to that estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7-11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held:* 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust,

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yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—*Hook, Adm'r of Dyer, v. Dyer, 214.*

4. *Administrators, sureties on bond of, suits against—Consent of parties can not confer jurisdiction on Circuit Court.*—Suit against the sureties on an administrator's bond was instituted in the Circuit Court of Dade county, but, on motion of defendants, was removed to the Circuit Court of Cedar county, where plaintiff obtained judgment. *Held*, that the latter court had no jurisdiction of the subject-matter, and that the judgment was unauthorized. The exclusive jurisdiction given to the Probate Court of Dade county (Sess. Acts 1845, p. 70) in such suits, by implication prohibits all other courts from acting, the Circuit Court of Cedar as well as that of Dade. Parties in such a proceeding can not by consent confer jurisdiction upon Circuit Courts.—*Dodson, Adm'r of Gray, v. Scroggs, Adm'r of Scott, 285.*

5. *Administration—Practice, civil—Pleading, motion to make more definite.*—In suit on the bond of a defaulting administrator, by his successor in office, plaintiff should set up affirmatively the fact of his appointment as administrator, and the failure of such averment would be good ground for motion to make the petition more definite and certain; and it is usual and proper in such petition to give the date of his letters and the court from which they were issued. But it is sufficient to aver in general terms that the defendant was executor or administrator of the particular estate.—*Id.*

6. *Administration—Barton County Probate Court—Suit against administrators must be first brought in the Probate Court.*—Suit brought against an administrator in Barton county must, under the statute of March 19, 1866 (Sess. Acts 1866, p. 85, § 6), concerning Probate Courts, in the first instance be determined in the Probate Court. And parties can not by consent confer jurisdiction on the Circuit Court.

Section 23 of said act was not intended to preserve the provisions of the general law authorizing suits against estates in the Circuit Court. It is not inconsistent with, nor can it be held to repeal, section 26, but simply applies the provisions of existing laws to the new court.—*Cones v. Ward, Adm'r, 289.*

7. *Administrator, claim brought into court by, and allowed without appointment of any one to defend, substantially a filing of claim.*—An administrator, within a year after taking out his letters, presented to the probate judge a claim against the estate. Without appointing "a suitable person to appear and manage the defense," the probate judge passed upon it. Some four years afterward, the error in the allowance being discovered, the claim was again called up and rejected as being barred by the statute of limitations. *Held*, that although such proceeding, so far as the judgment was concerned, was clearly irregular and perhaps void, yet, inasmuch as it showed that the administrator acted in good faith, and that he brought his demand into court, it would be construed as amounting to an exhibition of the demand within two years, within the meaning of the statute (Wagn. Stat. 102, § 2), so as to prevent the barring of the claim by limitation.

Although, in a technical sense, the claim might not be considered as filed in the manner called for by section 24, p. 105, Wagn. Stat., it substantially and

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sufficiently met the requisitions of the law.—*Williamson v. Anthony*, Adm'r of Cooksey, 299.

8. *Administration — Suit by administrator — Set-off — Affidavit — Presumption.*—Proof of the existence of a debt, which might be used as a set-off to a demand sworn to against an estate, is not of itself sufficient evidence to show *prima facie* that the debt was actually so applied, especially when neither the minutes of the court nor the account presented show anything in relation to the set-off. Affidavit of the claimant that he has allowed all just credits and set-offs establishes no such presumption.—*Sweet*, Adm'r of Jones, v. Maupin, 323.
9. *Administration — Sales — Requirements of statute must be complied with.*—The statute (Wagn. Stat. 98, § 33) which requires that proceedings concerning administrators' sales of real estate shall be reported to the court at the next term of the court after such sale, must be strictly complied with, or the sale will be held irregular and void. (*Speck v. Wohlien*, 22 Mo. 310; *Strouse v. Drennan*, 41 Mo. 289, cited and affirmed.)—*Mitchell v. Bliss*, 353.
10. *Administration — Final settlement has the force of a judgment.*—An administrator's final settlement must bind the estate with the force of a judgment unless it can be impeached for fraud.—*Picot*, Adm'r of Dillon, v. Bates, 390.
11. *Courts, probate — Claims, allowance of — Judgment, impeachment of.*—Where a Probate Court disallowed a credit claimed by an administrator in his final settlement against an estate, for a payment which had been made by him in advance of any order of that court, and within a year from the grant of his letters, the order of disallowance will, on appeal to the Supreme Court, be sustained, notwithstanding that the Probate Court had allowed and classified the claim paid by him. It is true that an allowance and classification by the Probate Court is in effect a valid judgment, which can not be impeached collaterally. But the disallowance of the credit does not rest upon the theory of any error or wrong in the judgment of the Probate Court.—*Dullard*, Adm'r of Dullard, v. Hardy, Adm'r of Dullard, 403.

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AGENCY.

1. *Agency — Co-owners of boat — Private bargain for transportation of freight — Trust.*—One who was a part owner and general active and managing agent of a steamboat, made a contract in his own name for the transportation of certain freight at a specified price. The contract was not made with reference to its being performed by the steamer mentioned, which was not at that time in port; but the contractor made use of the boat for the transportation of the freight, without mentioning to his co-owners his private arrangement as to price of freightage. *Held*, that he occupied a relation of trust toward the co-owners, and that they had a right to presume that he would exercise the most entire good faith in his dealings toward them, and that in

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- any business in which he employed the boat they were entitled to a proportionate share of the profits received and earned.—*Rea v. Copefin*, 76.
2. *Agency—Trustee not allowed to profit out of his trust—Application of rule.*—The rule that a trustee is not allowed to make a profit out of his trust is based on a principle of human nature that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict; and by a trustee, in this sense, is meant a person who acts representatively, or whose office is to advise and operate not for himself, but for others. This principle applies to and includes executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who in any respect have a concern in the business intrusted to them.—*Id.*
 3. *Agency—Bailment—Robbery—Ordinary care—Negligence.*—If money belonging to a bank is taken from its agent or collector by thieves or robbers when he is using ordinary care and is guilty of no negligence, he is clearly not liable.—*Rechtscherd v. Accommodation Bank*, 181.
 4. *Agency—Agent must obey instructions of principal, whether reasonable or otherwise, except where.*—It is the clearly-established rule of law that an agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, whether reasonable or not, unless prevented by some unavoidable accident, without any default on his part, or unless the instructions require him to do an illegal or immoral act; and it is no defense that he intended to act for the benefit of his principal. He is still responsible for loss occasioned by any violation of his duties, either in exceeding or disregarding instructions.—*Id.*
 5. *Bankrupt act of 1867—Agent—Commission merchant acts in a fiduciary capacity, within meaning of section 33.*—Under section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 538), an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in such capacity are not discharged under that act.—*Lemcke v. Booth*, 385.
 6. *Agency—Principal, ratification of acts of agent by—Appropriation and disposal of property.*—Where an agent, without the authority of his principals, borrows money and invests it in property, the principals, by afterward appropriating and disposing of the property for their own benefit, will be held to ratify the act and become liable; and the measure of their liability is the amount of money borrowed, and not that realized by the sale.—*Watson v. Bigelow*, 413.

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ARBITRATION AND AWARD.

1. *Arbitrations—Awards, attestation of, at what time necessary.*—The non-attestation of an award at the time of promulgation (see Wagn. Stat. 143, § 6) does not necessarily vitiate the award. The attestation is a formality that may be supplied after suit on the matters arbitrated has been brought, and after motion to confirm the award had been refused. And *semble*, that no

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attestation at all is necessary for the purpose of suing on the award where the submission did not provide for a confirmation under the statute.—Tucker v. Allen, 488.

2. *Arbitrations regarded with favor by courts.*—The Missouri statute concerning arbitration was plainly designed to encourage the adjustment of differences between parties by arbitration by providing a summary mode of enforcing awards and of setting them aside where good cause could be shown for doing so.—*Id.*
3. *Arbitrations—Award—Waiver—Evidence showing waiver of oath is competent.*—A written submission to arbitration is a statutory one, and under the statute touching arbitrations (Wagn. Stat. 143, § 3) the arbitrators must be sworn before proceeding to hear testimony. But the parties to the arbitration may waive the taking of the oath, and evidence of circumstances showing such waiver is competent before a jury.—*Id.*
4. *Arbitrations and awards—What constitutes a valid award to be determined by the court.*—Where an award is offered in evidence it is for the court to determine what facts were requisite to constitute a valid award, and to declare the legal effect of the award when made.—*Id.*

ASSESSMENT.

See REVENUE.

ATTACHMENT.

1. *Attachment—Judgment on constructive notice, petition to set aside—Case must be in position to be heard within two years—Waiver of notice, what not.*—Under the statute (Gen. Stat. 1865, p. 569, § 60; Wagn. Stat. 193, § 60) a petition to set aside a judgment in attachment, rendered on constructive notice, must be filed in court, in a position to be heard, within two years from the date of the judgment. And the notice of such proceeding, under section 61 of the act, must be filed fifteen days before the expiration of the two years. The mere filing of the petition within two years, when the case can not be reached for trial within that period, is not sufficient. A proper construction of the statute makes no distinction between the time for an appearance and the time for making proofs. And the petition must be filed in court, and not with the clerk or judge during vacation.
In such a proceeding, the appearance of the counsel for the other party, and his agreement to submit the cause to the court, notwithstanding the disqualification of the judge holding it to sit in the cause, would be no waiver of the sufficiency of the notice, but simply a waiver of objection to the judge who was to pass upon the sufficiency of the notice.—*Underwood v. Dollins*, 259.
2. *Attachment—Bond—Seal, what sufficient.*—The word "seal," printed between brackets, in an attachment bond, and adopted by the parties as their seal or scroll, was a sufficient sealing of the instrument.—*Id.*
3. *Attachment—Replevin—Evidence in what, proper.*—Certain goods having been seized by a sheriff on attachment as the property of A., were replevied by B., whereupon the sheriff admitted the taking, and justified on the ground that the goods were the property of A., and were taken in virtue of the attachment. In the replevin suit it was proper for B. to show that A. made to him false representations as to his financial standing, as going to prove that the goods were procured fraudulently. It was not competent, however, for the

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sheriff to show that A. had pledged the goods sued for, while yet in his possession, as security to a third party for borrowed money. Such testimony was not germane to the issues involved.—*Hart v. McNeil*, 526.

See MORTGAGES AND DEEDS OF TRUST, 7. PRACTICE, CIVIL—PLEADING, 1.

B**BANKS AND BANKING.**

1. *Married women, deposits by—May be withdrawn by husband, when—Construction of statute.*—The statute concerning savings banks and fund companies (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331-2, § 14) enables a married woman to deal with a bank without the intervention of her husband, in relation to deposits made by her; but it does not take from her husband his common-law right to reduce such fund to possession on his own checks.—*Clark v. National Bank of State of Missouri*, 17.

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BANKRUPTCY.

1. *Bankrupt act of 1867—Agent—Commission merchant acts in a fiduciary capacity, within meaning of section 33.*—Under section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 533), an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in such capacity are not discharged under that act.—*Lemcke v. Booth*, 385.

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1. *Bills and notes—Insurance company—Secretary, signature of—Authority.*—A draft signed by the secretary of an insurance company alone is not binding on the company where there was no evidence of any usage or law giving him authority to bind the company.—*The First National Bank of Kansas City v. Hogan*, 472.

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BOATS AND VESSELS.

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CONSTITUTION OF MISSOURI.

1. *Constitution, State, does not prohibit amendments or repeals by implication—Construction of statute.*—The act of March 18, 1870, touching the assess-

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ment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. IV, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void, and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it.—*State ex rel. Maguire v. Draper*, 29.

2. *Habeas corpus, constitutionality of law should not be tested by in the Supreme Court.*—Where one has been arrested and detained on legal process by a court having jurisdiction of the person and the offense, is in custody of the proper officer, and by virtue of a provision of the law, this court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of trial in the appropriate court.—*In re Harris*, 164.

See STATUTE, CONSTRUCTION OF.

CONTRACTS.

1. *Contracts—Care of aged persons—Contract for, contemplates what.*—In the execution of contracts to take care of aged persons, great patience with their infirmities is required. Such an agreement contemplates not only food, medicine and clothing, but good temper, forbearance, and an honest effort to please.—*Gupton v. Gupton*, 37.
2. *Contracts—Agreement to dispose of property by will—Parol contracts—Statute of frauds.*—An agreement to dispose of property by will in a particular way, if made on sufficient consideration, is valid and binding; and partial performance of a verbal contract of this description will take it out of the operation of the statute, when refusal to complete it would work a fraud on the other party.—*Id.*
3. *Contracts—Bill for specific performance, when proper.*—When the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific performance merely for the purpose of compensating the purchaser in damages, but will leave him to his action on the agreement. Some ground for equitable interference will be required, as when the contract is by parol and can not be enforced at law, but may be by proceedings in equity; or where the vendor has conveyed all his property, and a judgment for damages merely would be altogether useless.—*Id.*
4. *Bonds—Breaches—What insufficient assignment of.*—The condition of a bond was that the obligor should use his endeavors to sell certain lands before

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a given date. A petition on the bond, which stated that plaintiff did not know and could not say whether defendant did use his endeavors to sell and dispose of the property before the day mentioned, but that defendant did not sell and dispose of the property within the time specified, did not sufficiently assign the breaches of the bond.—*Schuyler v. Chittenden's Ex'r*, 65.

5. *Apprentice—Action by an indenture—Bar of statute deemed waived, when.*

—In an action by an apprentice upon an indenture given his master, brought more than two years after plaintiff became of age, defendant, if he fails to avail himself of the bar of the statute (Wagn. Stat. 137, § 17), either by demurrer or answer, will be held to have waived its benefits.—*Boyce v. Christy*, 70.

6. *Bonds, penal—Action on separate breaches—General judgment erroneous.*

—Where an action on an indenture given to an apprentice counts independently on various breaches, and their investigation involves separate and independent inquiries and findings, they should be held to be independent causes of action, although arising out of the same contract. A general verdict given in such a suit is erroneous, and judgment thereon may be arrested. Each count calls for a separate judgment, and the common-law rule of pleading can not apply under our statute (statute touching penal bonds, Wagn. Stat. 239).—*Id.*

7. *Bonds—Contracts—Purchase money of land—Obligations on note and bond mutually dependent, when.*

—When a bond is conditioned to convey land upon the payment of a note given for the purchase money, the vendor should tender a deed thereof if he seeks to recover on the note. The obligations on the bond and on the note are mutually dependent.—*Dietrich v. Franz*, 85.

8. *Contracts—Constitution—Act of 1859, vacating offices in the University of the State of Missouri, did not impair the obligation of a contract.*

—In a suit against the University of the State of Missouri, for salary claimed to be due plaintiff, it appeared that he had been elected to fill an office made vacant by the act of 1855 (R. C. 1855, p. 1502, § 24), for a term of six years, "subject to law;" that by the act of December 17, 1859 (Sess. Acts 1859-60, p. 91), all the offices of professors, tutors, and teachers connected with the university, including his own, had been declared vacant. *Held*, that the act was not unconstitutional as impairing the obligation of a contract.

The university was a public and not a private corporation. There were no grantees named in the act creating it (Sess. Acts 1838-9, p. 176), and consequently no parties either to accept or reject the grant. Under it the State entered into no compact with private parties; the private contributions given to secure its location did not make the contributors founders of the university; nor did the contributions alter the character of the institution.

Being elected, plaintiff did not hold his office by virtue of a contract with the university. He was an officer, and not an employee, of the institution.

Being elected "subject to law," he was subject both to existing laws and such laws as the Legislature might thereafter enact.—*Head v. Curators University of Missouri*, 220.

9. *Contract—Consideration—Promise given in consideration of a sale—*

Statute of frauds.—A. being indebted to B. for the purchase of goods, sold them to C., who, in consideration of the sale from A. to himself, promised A. to pay his debt to B. *Held*, that the sale was a good consideration for the

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promise; that B. might sue C. upon it in his own name, and that the promise need not be in writing.—*Flanagan v. Hutchinson*, 237.

10. *Contract—Ambiguity—Usage not proper evidence to explain written contract, when.*—No usage, however general and well understood, can be permitted to control the terms of a special contract, where its subject-matter and terms are clear of doubt and obscurity.

Evidence of usage comes in to show the intention of the parties in all those particulars which are not expressed in the contract, or which are expressed in unusual or technical terms.—*Kimball v. Brawner*, 398.

11. *Practice, civil—Pleadings—Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. But in suits on contracts of this nature the contracts must be distinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—*Henning v. United States Ins. Co.*, 425.
12. *Corporations—Insurance companies—Parol contracts can not be made when charter or by-laws call for written agreements.*—Corporations, when they are not restrained in any particular manner by their charters, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. And there are adjudicated cases showing that at common law, where no particular mode of insurance is pointed out in the charter, insurance companies may make verbal contracts of insurance which are binding and valid. But where a company's charter declares that "all conditions of policies issued by said company shall be printed or written on the face thereof," and its by-laws require that the president "shall sign all policies or other contracts by which the company shall be bound," and "that every proposal for insurance shall be by written application, signed by the applicant or his agent," such company can make no original or binding contract by parol.—*Id.*

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CONVEYANCES.

1. *Conveyances—Life estate—Mortgage—Conditional estate—Reverter—Forfeiture.*—A deed from A. to B. conveyed a life estate in certain premises, remainder in fee to the children of A.; and provided that in case of the attempt of B. to sell or dispose of his interest or life estate, except to the children, that estate should cease and the property vest absolutely in the children. B. afterward conveyed away the property by mortgage. *Held*, first, that the mortgage, either in itself or as perfected by subsequent action, was a sale such as worked a forfeiture of the life estate; second, that such estate was not one upon condition, with a reversion to the grantor upon condition broken, as the entire estate passed out of him with no possibility of reverter; that hence no declaration of forfeiture on the part of the grantor was necessary to determine the estate of the grantee, but that his life estate terminated, and that of

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- the children commenced, at once upon the making of the mortgage.—*Gilker v. Brown*, 105.
2. *Deeds—Delivery a question of law where there is no dispute as to the facts.*—Where the facts touching the delivery of a deed are undisputed, their legal effect is simply a question of law, upon which the court may be required to pass.—*Rogers v. Carey*, 232.
3. *Conveyances—Sheriff's sale, purchase at—Delivery to purchaser against will of original grantee.*—The grantees in a deed containing a false description took possession thereunder, and their interest in it was sold on execution. A delivery afterward to the purchaser of a correct deed would not be a constructive delivery to the grantees, so as thereby to pass the legal title through them to the purchaser, when they refused to receive the instrument. There could be no delivery to the grantees without their express or presumed consent.—*Id.*
4. *Conveyances, suit to reform—Evidence required.*—In a suit to reform a deed, if the mistake be denied by defendant, very positive evidence would be required to establish it; but where the mistake is admitted, a preponderance may be sufficient to show what was intended to be inserted in the place of the erroneous matter.—*Bunse v. Agee*, 270.
5. *Conveyances—Record—Consideration—Notice.*—As against the first grantee of an unrecorded deed of land, a record of his own conveyance by a subsequent purchaser from the first grantor will avail nothing, provided he purchase with notice of the original unrecorded conveyance, or his purchase is not made on payment of a good and valuable consideration.
- The actual notice required by the statute is used in contradistinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it—facts and circumstances coming to his knowledge that would put a man of ordinary circumspection on his inquiry—should go to the jury as evidence of such notice. Proof of actual knowledge of the existence of the former deed has never been held to be necessary, but the jury have the right to infer such knowledge from facts that would naturally suggest it, and from which the actual relation of the prior purchaser to the land might be reasonably inferred.—*Maupin v. Emmons*, 304.
6. *Sheriff's deed, recitals in.*—The recitals in a sheriff's deed are conclusive on the parties to the deed and those claiming under them.—*Durette v. Briggs*, 356.

See EQUITY, 11. FRAUDULENT CONVEYANCES. LANDS AND LAND TITLES,

12. MORTGAGES AND DEEDS OF TRUST. WILLS, 6.

CORPORATIONS.

1. *Revenue—Corporations, stock of, what liable to assessment.*—Not only the original stock, but all after-acquired capital stock of a corporation in private hands, is liable to assessment under the revenue act of 1864 (Sess. Acts 1863-4, p. 65).—*St. Louis Mutual Life Ins. Co. v. Charles*, 462.
2. *Revenue—Corporation—Capital stock—Shares of stock—Judgment against collector for taxes irregularly assessed, effect of.*—The statute makes a distinction between the liability to taxation of the property of a cor-

CORPORATIONS—(Continued.)

poration embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the corporation pay the tax, they pay it for the shareholders; and if judgment is rendered against the collector for the amount of taxes collected by him from a corporation, the result of the judgment will be to collect of defendant, for the use of the shareholders, a sum of money in effect paid for them and which they were under obligation to pay.—*Id.*

See **BILLS AND NOTES, 1. INSURANCE, FIRE AND MARINE. INSURANCE, LIFE. JURISDICTION, 1. LIMITATIONS, 3. PRACTICE, CIVIL—PLEADING, 10, 11. RAILROADS.**

CORPORATIONS—MUNICIPAL.

See **REVENUE 4, 6, 7. ST. LOUIS, CITY OF.**

COSTS IN CIVIL CASES.

1. *Practice, civil—Costs—Superfluous costs may be retaxed and money refunded by the clerk, when.*—Where superfluous and unnecessary matter is inserted in a transcript by the clerk, costs may be retaxed, and the clerk may be compelled to refund costs taxed for such superfluous matter.—*Smith v. Myers, 342.*

COUNTY TREASURER.

See **ELECTIONS, 1, 2, 3.**

COURTS, CIRCUIT.

See **ADMINISTRATION, 4, 6. COURTS, COUNTY, 1.**

COURTS, COUNTY.

1. *County Courts—Claims against counties—Res adjudicata—Appeal to Circuit Court.*—A County Court, in auditing claims against the county, is simply its financial agent, and not a judicial body. And it has never been held that the disallowance of a claim by a county operates as a judgment. The fact that an appeal lies from its action to the Circuit Court is no indication that such action is a judgment. This is but a statutory mode of bringing the county into the Circuit Court without original process, and the claimant may avail himself of it or commence suit.—*Reppy v. Jefferson County, 66.*
2. *County Court, order of—Order-book, entry in—Best evidence, when.*—An order of the County Court for the payment of money is properly entered on its order-book, and that entry is the best evidence of its action, and, until impeached for fraud or mistake, must determine its obligation.—*Id.*
3. *Courts, county, contracts with—Indexing, etc.*—Although, in making a contract for indexing the land record of a county, the County Court may expressly refer to a price named in a statute and make it govern the price fixed for the work agreed on, yet a price for services, referred to in a contract for indexing of lands as being such as is allowed for such services by law, is not thereby properly fixed, as no statute defines the price for those services. The fee allowed recorders for indexing deeds is no criterion in determining the value of services of this description.—*Id.*

COURT OF CRIMINAL CORRECTION.

See **INSURANCE, 11.**

COURTS, DISTRICT.

See **PRACTICE, CIVIL—APPEALS, 1, 2.**

COURT, ST. LOUIS CIRCUIT.

1. *Practice, civil — Act of March 4, 1869, does not authorize General Term to reverse merely on weight of evidence.* — The object of the fourteenth section of the act organizing the Circuit Court of St. Louis county in General Term, as amended by the act of March 4, 1869 (Sess. Acts 1869, p. 18, § 2), was not in any manner to change or enlarge the scope or powers of the court at General Term as they previously existed, but to provide for appeals in cases where it was apprehended that final judgment had not been rendered. But it does not authorize the General Term to reverse merely on weight of evidence. — *McKay et al. v. Underwood*, 185.

CRIMES AND PUNISHMENTS.

1. *Indictments — Misdemeanors — Selling liquor on Sunday.* — There is no statutory provision now authorizing indictments for the offense of selling liquor on Sunday. The misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), by implication repealed section 30, chapter 207, Gen. Stat. 1865; and the act (Sess. Acts 1869, p. 69) repealing that of March 27, 1868, did not in terms restore said section, and can not do so by implication. (Wagn. Stat. 894, § 3.)

But the offense is a statutory misdemeanor created by section 35, page 504, Wagn. Stat., and made subject to a fine not exceeding fifty dollars. Hence, under section 29, page 516, Wagn. Stat., the fine is recoverable in a civil action; and this particular method of proceeding being pointed out, must be pursued, and a common-law indictment will not lie. — *State v. Huffschildt*, 73.

2. *Practice, criminal — Indictment, allegations in — Repugnancy.* — An indictment charged defendant with forging a check "purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis." The check afterward set out showed the signature of "M. E. Susisky, treasurer." *Held*, that the two allegations were not inconsistent with and repugnant to each other. (*State v. Finley*, 18 Mo. 445.) — *State v. Kroeger*, 552.
3. *Criminal law — St. Louis city treasurer — Blank check, filling out and using for a different purpose than that directed, constitutes forgery.* — The treasurer of the city of St. Louis left with A. certain blank checks, with directions to fill them up to the use of holders of warrants against the city; but A. took one of the checks, inserted the date and amount, and the words "cash or bearer" in place of the words "order of," erased from the printed blank. By whom the words were erased did not appear. A. converted the check to his own private use, by depositing it in bank the same day on his private account, and drawing the money on it for his own use. *Held*, that under the statute law of this State (Wagn. Stat. 470, § 16) he was guilty of forgery in the third degree. As the check had been signed with specific instructions to use it for a certain purpose, A., in thus filling it up for a different purpose, clearly made a false instrument. — *Id.*

See CRIMINAL LAW. INSURANCE, 11. PRACTICE, CRIMINAL.

CRIMINAL LAW.

1. *Criminal law — Escape of prisoner before term expires — Second offense.* — A prisoner who, before the expiration of his term, escapes and commits another crime, may be convicted and sentenced therefor, although at the time still under sentence for his first offense; and his period of imprisonment for the second one will commence on the expiration of the first term. — *Ex parte Brunding*, 255.

CRIMINAL LAW—(Continued.)

2. *Criminal law—Misdemeanor—Constable, extortion by—Construction of statute.*—It belongs solely to the justice of the peace to determine the compensation to be allowed his constable for receiving and keeping property levied on. And until that question is determined by the justice, the exaction of any money from the debtor by the constable for such services is extortion and a misdemeanor within the meaning of the statute (Wagn. Stat. 488, § 19).
—State v. Vase, 416.
See PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages, exemplary—Trespass, in action of, when granted.*—Exemplary or punitive damages are recoverable in an action of trespass against the person, where injury was wantonly inflicted; and in such a suit the injured party may give in evidence such facts and circumstances accompanying the wrong as may have occasioned him special inconvenience and suffering.—Green v. Craig, 90.
2. *Corporations—Railroad companies—Damages to stock—Want of fences and cattle-crossings—Pleadings—Allegations, what necessary.*—In a suit against a railroad company for damages to stock, the petition, framed under the statute concerning railroad companies (Wagn. Stat. 810, § 43), averred that the injury occurred at a point where defendant's road passed through uninclosed prairie lands; that these lands were not fenced, nor the proper cattle-guards erected. But there was no averment or evidence that the animal strayed on the road through defect of cattle-guards or in consequence of the absence of fences, either at the locality of the injury or elsewhere. *Held*, that under such a state of the pleadings and evidence plaintiff would not be entitled to recover. To render the company liable it must appear that the animal injured entered on the road, in consequence of the absence of fences or cattle-guards, at a point on the line of the road which the company was bound to secure in that manner.—Cecil v. Pacific R.R. Co., 246.
3. *Damages, measure of—Contracts not completed by reason of the default or unwarranted acts of the other party—Quantum meruit, etc.*—Where the contractor is prevented from completing his job by the unwarranted acts and defaults of the other party, he may either sue upon the contract and claim damages for a breach of it, or he may waive the contract and sue for the reasonable value of his work. He is not restricted to a *pro rata* share of the contract price.—McCollough v. Baker, 401.
4. *Damages—Negligence, contributory.*—One person will not be allowed to impute a want of vigilance to another injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on his part.—Morrissey v. Wiggins Ferry Co., 521.
5. *Damages—Railroad companies—Negligence—Servant—Skill—Liability of company.*—A servant who has been injured by the negligence, misfeasance or misconduct of a fellow-servant, can maintain an action therefor against the master, where the servant, by whose negligence or misconduct the injury was occasioned, was not possessed of ordinary skill or capacity in the business intrusted to him, and the employment of such incompetent servant was

DAMAGES—(Continued.)

attributable to the want of ordinary care on the part of the master.—*Harper v. Indianapolis & St. Louis R.R. Co.*, 567.

6. *Railroad company, action against for damages—Fireman, incompetent—Permission by engineer to act in his place—Liability of company.*—In suit against a railroad company for injuries done to plaintiff, if it appear that the company was negligent or unmindful of its duty in employing competent and skillful servants in the execution of its business, and that injury resulted therefrom to a fellow-servant, it must be held responsible; and of the sufficiency of the proof to sustain this fact, the jury are the proper judges. And permission given by the company to an engineer to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty.—*Id.*

See AGENCY, 6. INJUNCTION, 3. INSURANCE, 1. JURISDICTION, 1. MORTGAGES AND DEEDS OF TRUST, 2. PRACTICE, CIVIL—TRIALS, 5.

DEPOSITIONS.

See EVIDENCE.

DESCENTS AND DISTRIBUTIONS.

See WILLS, 8, 9.

DESCRIPTION.

See LANDS AND LAND TITLES, 5. SALES, 1.

DIVORCE.

See HUSBAND AND WIFE, 3.

DOWER.

1. *Dower, statute touching—Appointment and continuance of commissioners.*—Under the statute relating to dower (Wagn. Stat. 544, § 29), when the first report made by the commissioners for its admeasurement was rejected, and one of the commissioners failed or refused to act, the court might properly appoint another in his stead, and continue the other two in office, for the purpose of again assigning dower, without a re-appointment.—*Lenox v. Livingston*, 256.
2. *Dower, commissioners appointed to determine—Action of, can not be interfered with, when.*—The commissioners appointed for the admeasurement of dower are the proper persons to determine as to what portion of the land of the deceased should be assigned, and, in the absence of testimony showing that they abused their discretion, their action can not be interfered with.—*Id.*
See HUSBAND AND WIFE, 4, 5. LANDS AND LAND TITLES, 13.

E**ELECTIONS.**

1. *Elections—County treasurer, appointed in January, 1871, entitled to office as against one elected in November.*—A. was elected county treasurer of St. Louis county in November, 1870. B. was appointed treasurer in January, 1871. In *quo warranto* to test the title of A. to the office, *held*, that the election in November was illegal and void; that notwithstanding that election, the office was vacant on January 5, 1871, and that B. was properly appointed to fill the vacancy.

ELECTIONS—(Continued.)

The clause of the act of March 3, 1857, fixing on the first Monday of August, 1858, and every six years thereafter, as the time for the election, was, in its designation of the day of the week for the election, in conflict with section 2, article II, of the present State constitution, and was therefore, so far forth, repealed; but the constitution did not affect the six years provided for the treasurer's term of office. And the Legislature was authorized to alter the law as to the day of the week, and fix on the Tuesday following the first Monday in August as that for the election. (Sess. Acts 1865-6, p. 88.) Hence the day for election was properly in August, and not in November.—*State ex rel. Attorney-General v. Fiala*, 310.

2. *Elections—County treasurer—Act of March 19, 1866, a general and not special law relative to the time of holding county, town and city elections.*—The act of March 19, 1866 (Sess. Acts 1865-6, p. 88), is not void as being in conflict with that part of section 27, article IV, of the State constitution which prohibits special legislation. Nor was it unconstitutional as reviving a special law. The act of March 3, 1857, was never revived by it.—*Id.*
3. *County treasurer—Elections—Act of March, 1857, not repealed by section 1, chapter 38, Gen. Stat. 1865, or by act of March 22, 1870.*—The act of March 3, 1857, was not repealed either by section 1, chapter 38, Gen. Stat. 1865, or the act of March 22, 1870 (Sess. Acts 1870, § 35). Neither of the last-named enactments had any reference to the local act of 1857. The object of that of March 22, 1870, was to amend the general law in relation to county treasurers (Gen. Stat. 1865, ch. 38, § 1). But, even supposing that the act of March, 1870, had been enacted as a new law throughout, and that its provisions were in conflict with the prior local act, it did not have the effect of repealing it by implication, as nothing indicates an intention on the part of the Legislature to do away with the local act. Section 2 of the act of March, 1870, in terms repealing all acts and parts of acts in conflict with it, refers only to general, inconsistent laws. It was no part of the purpose of the act to touch the question of elections or the term of office.—*Id.*

EJECTMENT.

1. *Ejectment—Judiciary act—Magwire v. Tyler—What points properly decided by Supreme Court.*—Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of *Magwire v. Tyler* was the validity of the respective confirmations to Brazeau and Labeaume.
Under the decision of the Supreme Court in that case (8 Wall. 650) the legal title vested in plaintiff, and under that ruling his proper remedy was ejectment. But suit was brought by bill in equity, and should be dismissed.—*Magwire v. Tyler*, 115.
2. *Equity—Ejectment—Bill to set aside deed and vacate title can not be united with suit for possession.*—In a bill to set aside a deed as fraudulent, the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered establishing plaintiff's title, he must then pursue his remedy in ejectment for the

EJECTMENT—(Continued.)

possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

See LANDS AND LAND TITLES, 4. MORTGAGES AND DEEDS OF TRUST, 4.

EQUITY.

1. *Contracts—Bill for specific performance, when proper.*—When the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific performance merely for the purpose of compensating the purchaser in damages, but will leave him to his action on the agreement. Some ground for equitable interference will be required, as when the contract is by parol and can not be enforced at law, but may be by proceedings in equity; or where the vendor has conveyed all his property, and a judgment for damages merely would be altogether useless.—*Gupton v. Gupton*, 37.
2. *Equity—Election, general principle of.*—The general principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.—*Graham v. Roseburgh*, 111.
3. *Equity—Specific performance—Election.*—A testator made a devise of "the residue" of his estate, in trust for the use and benefit of his heirs, among whom was A. Afterward the testator agreed to convey to A. a certain tract in Shelby county, which tract A. proceeded to possess and improve. On testator's death, the trustees paid over to A. his portion of the uses and profits derived from the "residue." In suit against the trustees for specific performance of testator's contract to convey, *held*, that A. would not be compelled to elect between the rents and profits of his share in the residue and the land in controversy. The disposal of the Shelby land during the lifetime of the testator took it out of the residuary clause, and showed that he had no intention to include that property in the devise.—*Id.*
4. *Ejectment—Judiciary act—Magwire v. Tyler—What points properly decided by the Supreme Court.*—Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of *Magwire v. Tyler* was the validity of the respective confirmations to Brazeau and Labeaume.
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5. *Equity—Ejectment—Bill to set aside deed and vacate title can not be united with suit for possession.*—In a bill to set aside a deed as fraudulent, the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered estab-

EQUITY—(Continued.)

lishing plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

6. *Equity—Statute changes only form of action—Court will not interfere in an action strictly equitable.*—Although, under the statute (Wagn. Stat. 999, § 1), legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action. The innovation extends only to the form of action in the pleadings. The party need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trover, trespass, or ejectment, without regard to ancient forms; but the distinction between the actions remains the same.

To entitle plaintiff to an equitable interference of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate and complete relief at law.—*Id.*

7. *Practice, civil—Issues in equity may be framed by the chancellor—Where not abused, the power will not be interfered with.*—It is permissible for a chancellor, in his sound discretion, to frame issues and take the opinion of a jury for his guidance; and when this power is not abused or wrongfully exercised it will not be interfered with. (Wagn. Stat. 1041, § 13.)—*Looker v. Davis*, 140.
8. *Conveyance, suit to reform—Evidence required.*—In a suit to reform a deed, if the mistake be denied by defendant, very positive evidence would be required to establish it; but where the mistake is admitted, a preponderance may be sufficient to show what was intended to be inserted in the place of the erroneous matter.—*Bunse v. Agee*, 270.
9. *Practice, civil—Equitable offset—Mortgage—Surety—Injunction, etc.*—In a suit on a note or account, an answer alleging that plaintiff is insolvent, and that defendant is liable, as plaintiff's surety, upon an over-due promissory note to a third party; that a suit had been commenced to foreclose a mortgage given by plaintiff to secure the note, and that the mortgaged property, in the opinion of defendant, will prove insufficient to pay the note in full, discloses no existing claim in favor of the defendant against the plaintiff, either legal or equitable, nor does it show any ground for enjoining the suit.—*Hopkins v. Fechter*, 331.
10. *Practice, civil—Chancery, issues in, opinion of the jury may be taken touching, etc.*—In the progress of a chancery proceeding the chancellor has the undoubted right to take the opinion of the jury on one or all of the issues arising in the cause. He may adopt their conclusion, but is not bound by it.—*Hickey v. Drake*, 369.
11. *Equity—Vendee of land, mistake by, good ground for setting aside the contract, when.*—A mistake on the part of the vendee, when he makes a contract for the purchase of land, relying on the false representations of the vendor, is good ground for rescinding it.—*Id.*
12. *Equity—Action to divest title—Agreement, when of the essence of a contract—Payment stipulated in cases affecting minors—What sufficient compliance with stipulation.*—In suit by a lessee against the heirs of his lessor, to divest title out of defendants and vest it in plaintiff, it appeared that

EQUITY—(Continued.)

by the terms of an agreement between the parties plaintiff was to have the privilege of purchasing the fee simple at any time within five years, but was required, if he elected to purchase, to give thirty days' notice of his intention to purchase, and to make payment of one-fourth. *Held:*

1. That notice given two days before the expiration of the five years was too late.
2. That defendants being minors, it was sufficient for plaintiff to aver his readiness to make the payment called for and to pay the money into court, subject to its order.
3. That the thirty days' notice was of the essence of the contract. The offer to sell within five years was simply a proposition without mutuality between the parties. For that reason time was of the essence of the agreement, and the acceptance must have been in accordance with the offer.
4. It was immaterial that defendants, being minors, were unable to convey. The notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance.—*Mason, Trustee of Mason, v. Payne*, 517.

13. *Equity—Decree need not embrace facts found.*—Under the present code it is not required that the facts upon which a decree is based shall be specifically found. In equity the case is now preserved in the same manner as in an action at law, by a bill of exceptions.—*Judge v. Booge*, 544.

See **INJUNCTION. LANDS AND LAND TITLES, 12. REVENUE, 16.**

ERECTIONS.

See **LANDS AND LAND TITLES, 8.**

EVIDENCE.

1. *Contracts, written—Parol testimony touching, when varying, improper.*—Parol testimony having a tendency to vary and impair written stipulations should be excluded.—*Murdock v. Ganahl*, 135.
2. *Conveyances, fraudulent—Evidence—Res gestæ—Sheriff's deed—Allegata and probata—Variance.*—A. bargained certain premises to B., who took A.'s bond for a deed and went into possession. Afterward B. sold out to C. a large amount of merchandise, being his whole stock in trade, and shortly afterward, at the time of consummating the bargain, also quit-claimed to him the premises. Subsequently the creditors of B. levied on the premises and sold them under execution. The purchaser at the sheriff's sale brought suit against C. to set aside B.'s quit-claim as fraudulent, and to vest title in plaintiff. *Held:*
 1. That testimony touching the sale of the merchandise was admissible as part of the *res gestæ*.
 2. That although the petition set out the judgment and execution under which the sale was made as being against B., whereas the deed described them as against B. and two others, there was not sufficient variance between the deed and the description of it in the petition to prevent its being read in evidence.
 3. That A. had no interest in the suit, and the omission of him as a party was no ground for arresting the judgment.—*Erfort v. Consalus*, 208.
3. *Evidence—Dying declarations, when admissible in civil actions as part of the res gestæ.*—The doctrine permitting dying declarations, as such, to be given in evidence, applies exclusively to criminal prosecutions for

EVIDENCE—(Continued.)

felonious homicides, and has no reference to civil cases. But in suits of the latter description, declarations of dying persons are sometimes admitted on a different principle. Thus, such a declaration in regard to the cause of death growing directly out of, and made immediately after the happening of, the fatal event, would be admissible as constituting a part of the *res gestæ*.—*Brownell v. Pacific R.R. Co.*, 239.

4. Evidence—Sale, testimony of vendor touching, after, inadmissible, when.

—Admissions made by a grantor in a deed, or an assignor in an assignment, after making the deed or assignment, are not competent evidence against the grantee or assignee. However, when a common purpose is shown in the assignor and assignee to defraud the creditors of the assignee, the rule is different.

But declarations of a vendor, not made until some time after the vendee had taken possession of the goods under the sale, and at a time when the vendor had no control over them, would be inadmissible. At that time he would have no such interest in the goods as would entitle him to make any declarations or admissions that could affect the rights of the vendee.—*Weinrich v. Porter*, 293.

5. Depositions—Certificate to, what sufficient.—The certificate to a deposition stating that the witness was sworn to testify in the cause, that the deposition was reduced to writing and subscribed by him in the presence of the officer, on the day and between the hours (naming them) mentioned in the notice, is a sufficient compliance with the statute (*Wagn. Stat. 526, § 22*).—*Thomas v. Wheeler*, 363.6. Evidence—Admissions of one in possession of property, explanatory of his possession, when proper.—The declarations or admissions made by one while in possession of property, explanatory of his possession—as that he holds it in his own right, or as a tenant or trustee of another—are admissible in evidence because they explain the character of the possession, and also as a part of the *res gestæ*.—*Id.*7. Insurance companies, fire—Admissions by officers, effect of.—A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.—*Northrup v. Mississippi Valley Ins. Co.*, 535.8. Insurance, fire—Declarations of president—*Res gestæ*.—In suit on a fire insurance policy the declaration of the president, at a time when claims for the losses were presented to him for settlement, that he would pay if other companies would, was evidence against the company as a part of the *res gestæ*.—*Id.*9. Practice, civil—Pleadings—Answer—New matter must be set forth in pleadings.—Under the old system of pleading the general issue, everything was open to proof which went to show a valid defense; but under the present practice act (*Wagn. Stat. 1015, § 12*), if defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language; otherwise he will be precluded from giving evidence of it at the trial.—*Id.*

EVIDENCE—(Continued.)

10. *Evidence—Admissions of principal, in suit against principal and sureties.*—Admissions made by a defaulting bank teller to the president, when the default was first discovered, were competent evidence against him and his sureties, because they formed a part of the *res gesta*, and were made by him while acting in the course of his official duty. But it would not be in his power afterward to make admissions to the detriment of his sureties. Where, however, suit was against himself and his sureties combined, such admissions would be evidence against himself, and the court should be asked to instruct the jury that such evidence should be disregarded so far as the sureties were concerned.—*Union Savings Association v. Edwards*, 445.
11. *Evidence—Parish registers of another State not competent evidence unless shown to be authorized by laws of that State—Statute law must be proved like any other fact.*—A parish registry, showing the date of a child's baptism, is not competent evidence of his birth or his identity. Nor is it competent as evidence at all unless it appears in proof that such registry is required to be kept by the laws of the State from which it is taken; and the statute of another State on this point must be proved like any other fact. No presumption can arise in reference to such statutes, nor will courts take judicial notice of them. In the absence of all proof the courts of this State will presume that the general principles of common law prevail in other States.—*Morrissey v. Wiggins Ferry Co.*, 521.
12. *Attachment—Replevin—Evidence in, what proper.*—Certain goods having been seized by a sheriff on an attachment as the property of A., were replevied by B., whereupon the sheriff admitted the taking, and justified on the ground that the goods were the property of A., and were taken in virtue of the attachment. In the replevin suit it was proper for B. to show that A. made to him false representations as to his financial standing, as going to prove that the goods were procured fraudulently. It was not competent, however, for the sheriff to show that A. had pledged the goods sued for, while yet in his possession, as security to a third party for borrowed money. Such testimony was not germane to the issues involved.—*Hartt v. McNeil*, 526.
13. *Evidence—Witness, impeachment of, on irrelevant matter.*—A witness is not to be interrogated on a subject not pertinent to the issues involved, for the mere purpose of discrediting him.—*Harper v. Indianapolis & St. Louis R.R. Co.*, 567.

See CONTRACTS, 10. COURTS, ST. LOUIS CIRCUIT, 1. HABEAS CORPUS, 2. HUSBAND AND WIFE, 11. PARTNERSHIP, 1. PRACTICE, CIVIL—APPEAL, 3. PRACTICE, CRIMINAL, 14. WITNESSES.

EXECUTIONS.

1. *Act of March 13, 1867—Construction of statute—Revenue—Special tax bills—Execution—Transcript.*—The act of March 13, 1867 (Sess. Acts 1867, p. 79, art. XI), repealing that of March 19, 1866 (Sess. Acts 1865-6, p. 79), does not authorize the enforcement of the judgment of a justice of the peace upon a special tax bill, on filing of a transcript of the judgment, by the issue of an execution thereon by the circuit clerk.—*Moran v. January*, 166.
2. *Executions, additional authorization in—Venditioni exponas—Act March 3, 1863.*—Where an execution in the form of an ordinary *venditioni exponas* was issued, reciting former levies and ordering the sale of what had been levied on, but leaving out entirely the command to levy on additional property,

EXECUTIONS—(Continued.)

as required by the act of March 3, 1863 (Sess. Acts 1863, p. 20, § 1), sale thereunder of additional property not before levied on would convey no title. The omission in the execution of the authorization to make additional levies would, in such case, not be held to be a clerical mistake, but a neglect by the party in interest to sue out the double writ to which he was entitled.—*Maupin v. Emmons*, 304.

3. *Executions—Sales under satisfied executions—Evidence, parol, touching.*—When it appears that certain of the premises levied on were sold by virtue of one or more executions after such executions were satisfied by the sale of other property, the deed as to such premises so subsequently sold is void and inoperative; and the question whether the premises were sold under executions which had thus performed their office was one to be decided either by the recitals of the sheriff's deed or by evidence *aliunde*.—*Durette v. Briggs*, 356.

See INJUNCTIONS, 2.

F**FIXTURES.**

See LANDS AND LAND TITLES, 8.

FORCIBLE ENTRY AND DETAINER.

1. *Forcible entry and detainer, question of right does not arise in.*—In actions of forcible entry and detainer the question of right does not arise.—*Van Eman v. Walker*, 169.

FORGERY.

See CRIMES AND PUNISHMENTS, 2, 3.

FRAUD.

See ADMINISTRATION, 10. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES.

FRAUDS, STATUTE OF.

1. *Contracts—Agreement to dispose of property by will—Parol contracts—Statute of frauds.*—An agreement to dispose of property by will in a particular way, if made on sufficient consideration, is valid and binding; and partial performance of a verbal contract of this description will take it out of the operation of the statute, when refusal to complete it would work a fraud on the other party.—*Gupton v. Gupton*, 37.
2. *Frauds, statute of—Undertaking to pay the debt of another, not made with creditor.*—The provision that no action shall be brought to charge any person upon the promise to answer for the debt of another, unless it is made in writing, is construed to apply to promises made to the creditor; and hence it is always held that while the creditor can not recover upon a collateral parol agreement made with him to pay his debtor's obligations, yet if such agreement be not made with the creditor it can be enforced if otherwise good, though not evidenced by any note or memorandum in writing.—*Brown v. Brown*, 130.
3. *Frauds, statute of—Undertaking to pay another's debt, made with debtor.*—An agreement to pay and discharge a debt, made with the debtor or some person interested for him, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or spirit of the statute.—*Id.*

FRAUDS, STATUTE OF—(Continued.)

4. *Contract—Consideration—Promise given in consideration of a sale—Statute of frauds.*—A. being indebted to B. for the purchase of goods, sold them to C., who, in consideration of the sale from A. to himself, promised A. to pay his debt to B. *Held*, that the sale was a good consideration for the promise; that B. might sue C. upon it in his own name, and that the promise need not be in writing.—*Flanagan v. Hutchinson*, 237.

See LANDS AND LAND TITLES, 9. PARTNERSHIP, 3.

FRAUDULENT CONVEYANCES.

1. *Conveyances, fraudulent—Evidence—Res gestæ—Sheriff's deed—Allegata and probata—Variance.*—A. bargained certain premises to B., who took A.'s bond for a deed and went into possession. Afterward B. sold out to C. a large amount of merchandise, being his whole stock in trade, and shortly afterward, at the time of consummating the bargain, also quit-claimed to him the premises. Subsequently the creditors of B. levied on the premises and sold them under execution. The purchaser at the sheriff's sale brought suit against C. to set aside B.'s quit-claim as fraudulent, and to vest title in plaintiff. *Held*:

1. That testimony touching the sale of the merchandise was admissible as part of the *res gestæ*.

2. That although the petition set out the judgment and execution under which the sale was made as being against B., whereas the deed described them as against B. and two others, there was not sufficient variance between the deed and the description of it in the petition to prevent its being read in evidence.

3. That A. had no interest in the suit, and the omission of him as a party was no ground for arresting the judgment.—*Erfort v. Consalus*, 208.

2. *Evidence—Sale, testimony of vendor touching, after, inadmissible, when.*—Admissions made by a grantor in a deed, or an assignor in an assignment, after making the deed or assignment, are not competent evidence against the grantee or assignee. However, when a common purpose is shown in the assignor and assignee to defraud the creditors of the assignee, the rule is different.

But declarations of a vendor, not made until some time after the vendee had taken possession of the goods under the sale, and at a time when the vendor had no control over them, would be inadmissible. At that time he would have no such interest in the goods as would entitle him to make any declarations or admissions that could affect the rights of the vendee.—*Weinrich v. Porter*, 293.

H

HABEAS CORPUS.

1. *Habeas corpus, constitutionality of law should not be tested by, in the Supreme Court.*—Where one has been arrested and detained on legal process by a court having jurisdiction of the person and the offense, is in custody of the proper officer, and by virtue of a provision of the law, this court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of trial in the appropriate court.—*In re Harris*, 164.

HABEAS CORPUS—(Continued.)

2. *Habeas corpus — Indictments — Evidence — Parol testimony.*—In *habeas corpus* to obtain the discharge of a prisoner convicted on two or more indictments, after the expiration of the first term of imprisonment, where the records showed that he was sentenced on the different indictments the same day, it will be presumed that the respective sentences were uttered at the same point of time; and it was incompetent to show, by parol testimony, that sentence in one case preceded the trial in the others by "some hours," unless, from the peculiar circumstances of the case, justice seemed to demand it.—*Ex parte Kayser*, 253.

HANNIBAL, CITY OF.

See REVENUE, 4.

HOMICIDE.

See PRACTICE, CRIMINAL, 14, 15.

HUSBAND AND WIFE.

1. *Married women, deposits by — May be withdrawn by husband, when — Construction of statute.*—The statute concerning savings banks and fund companies (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331-2, § 14) enables a married woman to deal with a bank without the intervention of her husband, in relation to deposits made by her; but it does not take from her husband his common-law right to reduce such fund to possession on his own checks.—*Clark v. National Bank of State of Missouri*, 17.
2. *Married women, statute concerning does not prevent husband from collecting in wife's personal chattels.*—Section 14, chapter 115, Gen. Stat. 1865 (Wagn. Stat. 935-6, § 14), concerning married women, simply deprives the husband of his power to convey away his interest in the real estate of his wife, and its rents, issues, and profits, without her consent and co-operation. But it does not restrain him from collecting in and reducing to possession her personal chattels and choses in action.—*Id.*
3. *Husband and wife — Legislative divorce supposed to be invalid — Power of wife to dispose of her separate property.*—By an act of the Missouri Legislature, a husband and wife were declared divorced, and for a period of twenty years afterward lived apart and ceased to intermeddle with the affairs of each other. Both married again and brought up children born of such marriages, built up separate and distinct property, and transacted their business without regard to any previous connection between them. *Held*, that under such circumstances, even admitting the divorce to be illegal, the law did not require the wife, after her second marriage, when she wished to dispose of her separate property, to prevail on her former husband to join in the conveyance, while he professed at the same time to be the husband of another woman. The length of time which elapsed after the divorce, and the manner in which each party regarded and treated the other, operated as an estoppel, and precluded them from interfering with the affairs of one another.—*Richeson v. Simmons*, 20.
4. *Married woman can provide for husband's debts by release of dower.*—It is competent for a married woman, with his consent, to provide for her husband's debts by release of her dower in his estate.—*Brown v. Brown*, 130.
5. *Married woman — Release of dower — Former release.*—A release of dower is not rendered valueless by the fact that the wife had previously released

HUSBAND AND WIFE—(Continued.)

- her dower in a deed of trust given to secure a debt which had been paid without sale.—*Id.*
6. *Wills*.—A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to the estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7-11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held*: 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust, yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—*Hook, Adm'r of Dyer, v. Dyer, 214.*
7. *Husband and wife—Separate property—Issues and products of real estate of wife*.—Where a married woman bought a farm and a quantity of personal property, partly on cash and partly on credit, and subsequently paid the notes given for the remainder due on the personalty out of the products of the farm: *held*, that such manner of payment of the personalty did not make it products of the real estate of the wife, so as to exempt it under the statute (Wagn. Stat. 935, § 14) from liability for the husband's debts.—*Fisk v. Wright, 351.*
8. *Insurance, life—Policy of, under statute, can not be assigned*.—A policy of insurance effected by the husband on his own life for the benefit of his wife and children, where the amount of premium actually paid was more than \$300, may be assigned so as to bar the wife from recovering the proceeds of the policy in case of her survivorship. (See Wagn. Stat. 936, §§ 15, 18.) But *semble*, that under section 15 *supra*, such assignment would be void, even though she join her husband therein, where the annual amount of the premium was less than \$300.—*Charter Oak Life Ins. Co. v. Brant, 419.*
9. *Insurance, life—Insurance by husband for benefit of wife—Statute an enabling act*.—At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. But the statute (Wagn. Stat. 936, §§ 15, 18) is an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman, for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children.—*Id.*

HUSBAND AND WIFE—(Continued.)

10. *Insurance—Married women, act touching—Insurance for benefit of—Right of wife to alienate such insurance.*—Under the law touching insurance for the benefit of married women (Wagn. Stat. 938, § 18), the wife has power to retain and appropriate insurance procured by her husband for her benefit if she sees fit, discharged from all claims of either her husband or his creditors. But it was not the intention of the Legislature in this act to impose on her any disability or restraint from alienation, where her act was free and voluntary. —Baker v. Young, 453.
11. *Married women, actions to charge separate property of—Insolvency of husband may be shown in evidence.*—In an action to charge the separate estate of a married woman for goods sold her, the insolvency of the husband may be proved in order to show, first, to whom credit was given, and second, whether the goods were necessities adapted to the condition of the wife. —Miller v. Brown, 504.
12. *Married women, actions to charge separate property of—Intent to charge separate estate will be presumed, when.*—In suit to charge the separate property of a married woman for goods sold her, it appeared that she was introduced to plaintiff as a woman of wealth, and, before the debt sued on was contracted, had purchased several bills in her own name, which were always paid on presentation. The bill in suit she promised to pay at different times. Her own testimony showed that she did not intend to charge her separate estate, but did intend to charge her husband; that what she bought were necessities adapted to her condition in life; but she admitted that she bought them in her own name, saying nothing about her husband. *Held*, that as she made the contract for herself, in her own name and on her own credit, the law will presume that she intended to charge her separate estate, notwithstanding her testimony to a contrary intent.
1. Under such circumstances, as against her property, it was immaterial whether the goods furnished were necessities which the husband ought to have supplied.
2. In such suit against the husband, the proper amount of money to be expended by her for necessities was to be determined by his condition in life, and not hers.
3. It was immaterial whether her debt was evidenced by a written instrument or not. Under the decision in *Whitesides v. Cannon*, the difference between the written and parol promise of a married woman is necessarily ignored. Yet there is this distinction touching the burden of proof: where goods designed for personal or family consumption are sold to the wife on her parol promise of payment, she will be presumed to purchase on the credit of her husband, while purchases made on her written agreement will be presumed to have been made on her separate credit. —*Id.*

See MECHANICS' LIENS, 4. MORTGAGES AND DEEDS OF TRUST, 4.

I

INDICTMENTS

See PRACTICE, CRIMINAL.

INJUNCTION.

1. *Injunction—Remedy resorted to, when.*—Where perfect remedy exists at law, resort should not be had to injunction. —Hopkins v. Lovell, 102.

INJUNCTION—(Continued.)

2. *Injunction—Execution sales—Cloud on title.*—Injunction will not lie to stay execution sales simply on the ground that they will pass no title and may cast a cloud on the title of the true owner.—*Kuhn v. McNeil*, 389.
3. *Injunction, assessment of damages on dissolution of—City of St. Louis, counsel for.*—The damages to be assessed upon the dissolution of an injunction (*Wagn. Stat.* 1030, § 13) are what the defendant has actually suffered. And in the assessment of damages on the dissolution of an injunction against the city of St. Louis, it appearing that the city counselor received no special fee for defending the injunction suit, *held*, that a fee for such defense could not be taxed as damages.—*Uhrig v. The City of St. Louis*, 528

See REVENUE, 16.

INSANITY.

See OFFICERS, 2.

INSURANCE, FIRE AND MARINE.

1. *Insurance companies, actions against—Vexatious delay, proof of—Jury—Verdict.*—In actions against insurance companies, under chapter 90, section 1, *Gen. Stat.* 1865, direct and explicit proof that the delay or refusal of payment was vexatious, is not required, but the jury must form their conclusions from all the facts and circumstances of the case.—*Lockwood v. Atlantic Mutual Ins. Co.*, 50.
2. *Insurance—Freight list—Total loss—Profits—Measure of damages.*—On an open policy of insurance the insurable interest in freight to be transported is not the net amount after deducting expenses, but the gross amount to be received according to the bills of lading or charter-party. And in an action on such a policy to recover the insurance money on a freight list, where the boat was a total loss, the estimated expense of carrying the goods from the place of loss to the point to which the goods were shipped should not be deducted from the amount claimed. It is immaterial what further expenses would have accrued, what would have been the profits, or whether any, or what amount the assured would have received for freight if the voyage had not been broken up. The valuation on the freight fixes the liability of the company.—*Id.*
3. *Insurance, fire—Policy—Certificate of loss, sworn to by agent, when sufficient.*—It is the undoubted duty of one insured by a fire insurance company to furnish a sworn certificate of loss, where required to by the terms of the policy; and the performance of such a duty is a condition precedent to his recovery. And although ordinarily it would be a fatal objection to the certificate that it was sworn to by the agent, and not by the insured, yet proof and certificate made by an agent with whom the company had all their dealings, who was in sole possession of the property insured, and who alone knew the facts necessary to be embodied in the paper—who, in fact, was, as it were, insured as agent—is a compliance with the policy.

Even were a certificate so sworn to bad, the defect would be held to be waived where the company received the certificate, made no objection to it on that account till the case came on for trial, and long after the thirty days within which the certificate was to be furnished had expired, and, when payment was refused, placed the refusal on other grounds.—*Sims v. State Ins. Co. of Hannibal*, 54.

INSURANCE, FIRE AND MARINE—(Continued.)

4. *Insurance, fire — Premium note — Forfeiture for non-payment at maturity, how treated.*—While the law does not forbid, it certainly will not favor, but will rather lean against, forfeiture of a fire insurance policy for want of promptness in paying a premium note.—*Id.*
5. *Insurance, fire — Premium note — Non-payment — Forfeiture — Acceptance of proposal — Waiver.*—On the third day after the maturity of a premium note given on a fire insurance policy, the maker, not knowing how much would be actually due the company, wrote them a letter proposing to pay, and asking for a statement of the amount. The company at once applied upon the note the amount in their hands, and directed him to remit the balance, which he did by the first mail. *Held*, that the acceptance by the company of his proposal to pay was a complete waiver of the forfeiture arising from the non-payment of the note at maturity, and that they were liable on the policy when the property was burned after such acceptance, although before the remittance was forwarded.—*Id.*
6. *Insurance, fire — Misrepresentation — Warranty, breach of — Business of insured — Incidents of, supposed to be known to insurer.*—In suit on a fire insurance policy, where it appeared that the insured, in his application for insurance, stated that the purpose for which the building to be insured was used was "tobacco-pressing; no manufacturing;" and that, in fact, he used an addition to the main building for manufacturing hogsheads for the tobacco, the representation would not necessarily be such a concealment of the uses of the building as to constitute a breach of warranty which would vitiate the policy. Officers of an insurance company are supposed to know all the incidents of the business of the insured, and if there is any branch of it considered extra-hazardous, and which they are unwilling to cover by their contract, it should be specially provided against. Whether the preparation of the hogsheads was such an incident to the business as to be included in it, was a question of fact, and, if fairly presented to the jury, need not be reconsidered in this court.
In such suit the jury should be instructed to determine whether it is so generally customary for those engaged in the business of tobacco-pressing to prepare their own hogsheads, and in the building where the business is conducted, that such a preparation can properly be called an incident to the business.—*Id.*
7. *Insurance companies — New charter treated as amendment to old one, prior to change of constitution, when.*—The Hope Mutual Insurance Company was incorporated in 1857. In 1864 a new charter was obtained, which did not purport in terms to be an amendment to the old one, but had precisely the same title and embodied most of its provisions, with the addition of certain new ones. *Held*, that, under the present State constitution, it could not be treated as an amendment, both from defect of title and from want of proper specifications in regard to the act repealed. But under the constitution in force at the passage of the new charter, if, from the general scope of the act, it was evidently intended as such amendment or supplement, courts must so treat it.—*Hope Mutual Ins. Co. v. Beckman*, 93.
8. *Insurance companies, mutual, suit on premium note by — Amendment of charter, acceptance of by company.*—In general, the directors of a moneyed corporation, when the Legislature has parted with control over the charter,

INSURANCE, FIRE AND MARINE—(Continued.)

have no power to procure or validate by consent such changes in the charter as require the assent of the corporation. But in a suit by a mutual insurance company, after a change in its charter, against one of its former stockholders, on a premium note given prior to the change, no burden is thrown upon the company, as a part of its case, to show a due acceptance of the amendment by the corporation itself. The assent to the new charter by the corporation will be inferred from any acts or omissions inconsistent with any other hypothesis.—*Id.*

9. *Insurance—Certificate of assessment filed before justice as statement of cause of action, effect of.*—In a suit by an insurance company against a stockholder on his premium note, commenced before a justice of the peace, the filing by plaintiff of the certificate of assessment upon defendant's policy instead of his premium note, was not a fatal irregularity, but one which might be corrected whenever objection was raised to it, and would not vitiate a judgment if the trial were suffered to progress without raising it.—*Id.*
10. *Revenue—Foreign insurance companies—Ordinance compelling payment of \$200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to payment of \$200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, article iv, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, page 780, Wagn. Stat., compelling agents of foreign insurance companies to pay an annual tax of \$100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—*City of St. Louis v. Independent Ins. Co. of Massachusetts*, 146.
11. *Insurance, foreign—Agent—Proceedings against—Information—Court of Criminal Correction.*—One acting as agent and receiving premiums in St. Louis county, on behalf of a foreign insurance company which was not authorized by the superintendent of the insurance department to do business in this State, contrary to section 42 of the act concerning insurance other than life (Wagn. Stat. 777), may be proceeded against under section 30, p. 516, Wagner's Statutes. Notwithstanding that the statute which creates the offense provides for a different remedy (Wagn. Stat. 777, § 43), there is no inconsistency between the two statutes. But the proceeding in such case must be by information in the Court of Criminal Correction, and not by indictment.
As to all the rest of the State besides St. Louis county, the misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), repealed by implication section 30 *supra*, and was not restored by the repealing act of February 24, 1869 (Sess. Acts 1869, p. 69). (See *State v. Huffschtmidt*, *ante*, p. 73.)—*State v. Stewart*, 382.
12. *Practice, civil—Pleadings—Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. But in suits on contracts of this nature the contracts must be dis-

INSURANCE, FIRE AND MARINE—(Continued.)

tinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—*Henning v. United States Ins. Co.*, 425.

13. *Corporations—Insurance companies—Parol contracts can not be made when charter or by-laws call for written agreements.*—Corporations, when they are not restrained in any particular manner by their charters, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. And there are adjudicated cases showing that at common law, where no particular mode of insurance is pointed out in the charter, insurance companies may make verbal contracts of insurance which are binding and valid. But where a company's charter declares that "all conditions of policies issued by said company shall be printed or written on the face thereof," and its by-laws require that the president "shall sign all policies or other contracts by which the company shall be bound," and "that every proposal for insurance shall be by written application, signed by the applicant or his agent," such company can make no original or binding contract by parol.—*Id.*

14. *Insurance companies, fire—Indorsements by secretary and president, effect of.*—The acting secretary of an insurance company indorsed on a policy issued on certain property which had been sold to A. prior to the expiration of the policy, "Loss, if any, payable to A." The president further indorsed: "This policy is hereby changed to cover chairs and benches, instead of the museum collection, which is removed." *Held*, that the indorsements constituted valid contracts of insurance, and that the company was liable thereon.—*Northrup v. Mississippi Valley Ins. Co.*, 435.

15. *Insurance companies, fire—Admissions by officers, effect of.*—A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.—*Id.*

16. *Insurance, fire—Declarations of president—Res gestæ.*—In suit on a fire insurance policy the declaration of the president, at a time when claims for the losses were presented to him for settlement, that he would pay if other companies would, was evidence against the company as a part of the *res gestæ*.—*Id.*

See **BILLS AND NOTES**, 1. **PRACTICE, CIVIL—PLEADING**, 10. **REVENUE**, 5, 6, 7, 8.

INSURANCE, LIFE.

1. *Forfeitures not favored.*—Forfeitures, if legally established, must be enforced, but are not favored.—*Froelich v. Atlas Life Ins. Co.*, 406.
2. *Insurance companies—Premium notes, forfeiture of for non-payment waived by subsequent receipt of money.*—The forfeiture of an insurance policy for non-payment of the premium note will be waived by subsequent receipt, without objections, of the money by the company.—*Id.*
3. *Insurance, life—Policy of, under statute, can not be assigned.*—A policy of insurance effected by the husband on his own life for the benefit of his wife

INSURANCE, LIFE—(Continued.)

and children, where the amount of premium actually paid was more than \$300, may be assigned so as to bar the wife from recovering the proceeds of the policy in case of her survivorship. (See Wagn. Stat. 936, §§ 15, 18.) But *semble*, that under section 15 *supra*, such assignment would be void, even though she join her husband therein, where the annual amount of the premium was less than \$300.—*Charter Oak Life Ins. Co. v. Brant*, 419.

4. *Insurance, life — Insurance by husband for benefit of wife — Statute an enabling act.*—At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. But the statute (Wagn. Stat. 936, §§ 15, 18) is an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman, for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children.—*Id.*

5. *Insurance — Married women, act touching — Insurance for benefit of — Right of wife to alienate such insurance.*—Under the law touching insurance for the benefit of married women (Wagn. Stat. 938, § 18), the wife has power to retain and appropriate insurance procured by her husband for her benefit if she sees fit, discharged from all claims of either her husband or his creditors. But it was not the intention of the Legislature in this act to impose on her any disability or restraint from alienation, where her act was free and voluntary.—*Baker v. Young*, 453.

J

JUDGMENTS.

1. *Practice, civil — Judgment — Amendment of in General Term, when proper.*—When a verdict is based on conflicting testimony, a portion of which is improperly permitted to go to the jury to influence their determination, the only relief competent for the General Term to administer is to reverse the judgment of the court below and remand the case for a new trial. But where plaintiff, on the face of the papers, is entitled to the judgment awarded by the General Term, and the defense insisted on is a total failure, it would be warranted in proceeding to enter up such judgment as ought to have been rendered at Special Term. (See Sess. Acts 1869, p. 18, § 2.)—*Murdock v. Ganahl*, 135.
2. *Judgment — Where motion to dismiss was granted, judgment thereon may be final.*—Suit was dismissed on motion, and the court thereupon rendered judgment in favor of defendant for costs, and awarded execution accordingly. *Held*, that the judgment, though informal, was nevertheless final.—*Flanagan v. Hutchinson*, 237.

See PRACTICE, CIVIL — PLEADING, 11. REVENUE, 10.

JURISDICTION.

1. *Damages — Illinois railroads, whose chief place of business is not in St. Louis — Jurisdiction of courts of this State.*—In suit for damages against the Chicago, Alton and St. Louis Railroad Company, the proof showed that by defendant's charter its "chief office" was to be held in

JURISDICTION—(Continued.)

Chicago; that the company had an office in the city of St. Louis for the sale of tickets and for receiving and handling freight; but the general freight office, the offices of the president and secretary and the board of directors, were in Chicago. *Held*, that under the statute concerning corporations (Wagn. Stat. 292, § 19) the courts of this State had no jurisdiction.

Where the road terminates opposite the city of St. Louis, and has its chief office for the transaction of business in St. Louis, then the law regards it as a domestic corporation and amenable to the jurisdiction of our courts by the ordinary process of summons.—*Robb v. Chicago & Alton R.R. Co.*, 540.

SEE ADMINISTRATION, 4, 6. PRACTICE, CIVIL—PARTIES, 1.

JURY.

See PRACTICE, CIVIL—TRIALS, 8, 9, 10. PRACTICE, CRIMINAL, 4, 5. ST. LOUIS, CITY OF, 6.

JUSTICES' COURTS.

1. *Courts, justices'—Appeal—Appearance of appellee after second day of term—Construction of statute.*—A proper construction of section 22 of the act concerning justices (Wagn. Stat. 850) does not require the appellee, in a cause carried to the Circuit Court from a justice's court, to enter his appearance on or before the second day of any subsequent term after the first at which the appeal is triable, in order to procure a hearing. If the appellee appear at such term when his case is called for trial, and announce himself ready, he should be treated as any other party in court upon summons or voluntary appearance.

In case of his appearance the appellant would be entitled to a reasonable time thereafter to prepare for trial.—*Hammerstein v. Haase*, 498.

See REVENUE, 10.

L

LANDS AND LAND TITLES.

1. *Conveyances—Life estate—Mortgage—Conditional estate—Reverter—Forfeiture.*—A deed from A. to B. conveyed a life estate in certain premises, remainder in fee to the children of A.; and provided that in case of the attempt of B. to sell or dispose of his interest or life estate, except to the children, that estate should cease and the property vest absolutely in the children. B. afterward conveyed away the property by mortgage. *Held*, first, that the mortgage, either in itself or as perfected by subsequent action, was a sale such as worked a forfeiture of the life estate; second, that such estate was not one upon condition, with a reversion to the grantor upon condition broken, as the entire estate passed out of him with no possibility of reverter; that hence no declaration of forfeiture on the part of the grantor was necessary to determine the estate of the grantee, but that his life estate terminated, and that of the children commenced, at once upon the making of the mortgage.—*Gilker v. Brown*, 105.
2. *Lands and land titles—Action for recovery of lands, limitations to—Acts in force when action commenced, not when cause of action accrued, must govern, when.*—Where the right of action for the recovery of real estate accrued in 1833, and plaintiff in the action became of age in 1849, suit brought in 1867, being less than twenty but more than ten years afterward, would be

LANDS AND LAND TITLES—(Continued.)

barred by the statute of limitations. The case would be governed by the act of 1847 (Sess. Acts 1847, pp. 94-5, §§ 1, 4) limiting the right of action to ten years, and not by that of 1825, allowing twenty years after the removal of disability within which to sue. The case would not be taken out of the provisions of the act of 1847 by section 15 of the act of 1855 (R. C. 1855, p. 1053). Under a proper interpretation of that section the action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in that section can have no reference to those in force when the right of action accrued, but when the act of 1855 took effect. It can have no reference to any acts of limitation prior to those of 1847. (See *Billion v. Walsh*, 46 Mo. 492.) — *Id.*

3. *Partition, sale imports no warranty of title.*—In a suit by a sheriff on a note given by the purchaser of land at sheriff's sale in partition, for the payment of the purchase money, an answer averring failure of title in the grantor constitutes no defense. A sale in partition imports no warranty of title. The deed simply conveys the interest of the parties to the proceedings, and is only a bar against them and persons claiming under them.—*Cashion v. Faina*, 133.

4. *Lands and land titles — Confirmation — Patent — Equitable title — Ejectment.*—The legal title to lands confirmed under act of Congress of March 3, 1807 (2 U. S. Stat. 401), remains in the United States until the government issues its patent. The confirmation, therefore, vests in the confirmer nothing more than an equitable title, and such title constitutes no defense to a suit in ejectment as a matter of evidence, unless pleaded or in some way set up as an equitable bar to the action. — *LeBeau v. Armitage*, 133.

5. *Lands and land titles — Intention of parties to govern in description contained in deed.*—Where it was manifest, from a construction of the descriptive parts of a deed, in connection with its recital, that the parties intended, the one to grant and the other to acquire the title to lands, subject to the jurisdiction of the County Court of Washington county, in this State, and it further appeared that there were no other lands subject to that jurisdiction which met the calls of the deed, the deed sufficiently describes the land as located in this State, although it fails to state in terms that the land was situated in Missouri.

The intention of parties to a deed, in describing land, is to be deduced from the instrument, as in the case of any other contract.—*Long v. Wagoner*, 178.

6. *Lands — Swamp lands — Sale of by County Court, act of 1868 to validate, not unconstitutional.*—Certain swamp lands were sold by the County Court of Barton county. The court had full jurisdiction in the premises, but the sales were attended with informalities and irregularities. Held, that the act of March 26, 1868, validating the titles to those lands, was not unconstitutional as being retrospective in its operation.

As between individuals, the Legislature can not validate void deeds. But counties are not individuals. They are political divisions of the State; their functions are of a public nature; they hold their property in subordination and under the control of the Legislature.

The law distinguishes between sales by County Courts which are without authority and absolutely void *ab initio*, and those which are made by authority of law, but are informal and irregular.—*Barton County v. Walser*, 189.

LANDS AND LAND TITLES—(Continued.)

7. *Lands and land titles—Adverse possession.*—An uninterrupted, notorious, adverse possession of ten years, under claim of title in fee, operates to vest in the claimant so holding possession the title to the claimed land, as effectually as though such title had been acquired by deed. And in suit by claimant for the land, he is not estopped from setting up his possessory title in opposition to a paper title of defendant, by reason of his having procured a quit-claim deed to the property from defendant's grantor, when the purpose of that deed was not to defeat but to affirm existing rights; as where it was given to remedy an error in the description contained in the original deed to defendant's grantor of the land actually sold and intended to be conveyed.—*Wall v. Shindler*, 282.
8. *Lands and land titles—Erections, removal of—When personal property—License.*—When one builds a house or fence, or places any other erection upon the land of another, with his permission, and with the intention that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. (*Matson v. Calhoun*, 44 Mo. 368.—*Lowenberg v. Bernd*, 297.
9. *Lands and land titles—Boundaries—Verbal agreement—Subsequent description in deed given by mistake.*—A verbal agreement, accompanied by possession and improvement, permanently locating a division line, is founded upon a good consideration, is not contrary to the statute of frauds, and will bind the parties and their privies. And one holding under a party to such an agreement may invoke it, although his deed of purchase by mistake prescribed a different line. The agreement would not be merged in or overruled by the deed.—*Kincaid v. Dorney*, 337.
10. *Lands and land titles—Division fence—Land occupied by mistake not held adversely, when.*—One holding by mistake up to a division fence and over the true line, without intending to own anything more than what is embraced in the true line, does not hold the space intermediate between that line and the division fence adversely to the rightful owner.—*Id.*
11. *Lands and land titles—Surveyor—Plats and field-notes—Magnetic variation—New and old lines.*—When a surveyor makes and describes a new line by courses and distances, his plats and field-notes must show the magnetic variation from the meridian; but in establishing old quarter-section corners (*Wagn. Stat.* 1312, § 31), or in establishing center corners upon the open lines (*id.* 1310, § 24), the surveyor need not ascertain the magnetic variation.—*Id.*
12. *Lands and land titles—Conveyances—Equitable title.*—The general rule is that a purchaser must at his peril inquire into the state of his grantor's record title, since he will be affected with constructive notice of all duly-recorded conveyances by his grantor affecting the same; and the rule will hold as to the vendee of equitable title merely, as where the holder of a title bond for the conveyance of land gives his deed of trust to secure the purchase money, and before foreclosure sells and delivers to another the title. It makes no difference that in such a case the grantor had vested in himself no title of record.—*Digman v. McCollum*, 372.
13. *Lands and land titles—Quieting of titles, action for—Dower, unassigned—Adverse claim—Limitation, act of.*—An unassigned dower interest in land is neither a title nor an estate in the scientific sense of those terms, but it is an adverse "claim" which the holder may be called upon to defend under

LANDS AND LAND TITLES—(Continued.)

the statute relating to the quieting of titles (Wagn. Stat. 1022, § 53). And a judgment in such a proceeding would bar the right of dower. And suit to compel the claimant of a dower interest to come in and defend her rights is proper, notwithstanding that it might restrict the time otherwise given her, under the statute of limitations, within which to test her claim of dower.—*Benoist v. Murrin*, 537.

14. *Lands and land titles—Tenants in common—Adverse possession by one as against others—Limitations, statute of.*—One of a number of tenants in common took the sole possession of land and held the same continuously for more than ten years, claiming the same as his own exclusive property and taking the rents and profits to his own exclusive use. The other co-tenants were aware of his possession and his claim, but set up no claim to the adverse possession, and, on the contrary, manifested a perfect and entire acquiescence. *Held*, that in this State the co-tenant in possession will be considered as having created a statutory bar against the title of the others.—*Lapeyre v. Paul*, 586.

15. *Lands and land titles—Tenants in common—What act will show adverse possession by one against the others.*—The presumption of law is that the possession of one tenant in common is the possession of the co-tenants as well. Unity of possession is of the very essence of tenancy in common. Hence, in consequence of this legal presumption, to establish the title of one co-tenant against another, there must be on his part outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them.—*Id.*

See CONVEYANCES, 5. EQUITY, 11. FORCIBLE ENTRY AND DETAINER, 1.

LARCENY.

See PRACTICE, CRIMINAL, 11.

LEASE.

1. *Equity—Action to divest title—Agreement, when of the essence of a contract—Payment stipulated in cases affecting minors—What sufficient compliance with stipulation.*—In suit by a lessee against the heirs of his lessor, to divest the title out of defendants and vest it in plaintiff, it appeared that by the terms of an agreement between the parties, plaintiff was to have the privilege of purchasing the fee simple at any time within five years, but was required, if he elected to purchase, to give thirty days' notice of his intention to purchase, and to make payment of one-fourth. *Held*:

1. That notice given two days before the expiration of the five years was too late.

2. That defendants being minors, it was sufficient for plaintiff to aver his readiness to make the payment called for and to pay the money into court, subject to its order.

3. That the thirty days' notice was of the essence of the contract. The offer to sell within five years was simply a proposition without mutuality between the parties. For that reason time was of the essence of the agreement, and the acceptance must have been in accordance with the offer.

4. It was immaterial that defendants, being minors, were unable to convey.

LEASE—(Continued.)

The notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance.—*Mason v. Payne*, 517.

LICENSE.

See **REVENUE**, 5, 6, 7, 8.

LIEN, VENDOR'S.

1. *Sales—Vendor's lien waived by taking collateral security.*—It is the settled law in this State that where the vendor of land takes collateral security for the purchase money, he will be presumed to have waived his lien upon the land conveyed; and if he entertained a different intent, he must show it by satisfactory testimony.—*Durette v. Briggs*, 356.

LIMITATIONS.

1. *Limitations, statute of—Acknowledgment and promise, what sufficient to avoid the statute.*—An acknowledgment of indebtedness, in order to take a case out of the statute of limitations, must contain an unqualified and direct admission of a present subsisting debt on which the party is liable and willing to pay.
An offer to compromise and a promise to pay part of an amount claimed if the offer were accepted, where the creditor refused to accept, was not an acknowledgment of an absolute subsisting debt, coupled with an admission that the party was liable and willing to pay, such as to remove the bar of the statute. Till the acceptance of the offer the liability did not accrue.—*Chambers v. Rubey*, 99.
2. *Lands and land titles—Actions for recovery of lands, limitations to—Acts in force when action commenced, not when cause of action accrued, must govern, when.*—Where the right of action for the recovery of real estate accrued in 1833, and plaintiff in the action became of age in 1849, suit brought in 1867, being less than twenty but more than ten years afterward, would be barred by the statute of limitations. The case would be governed by the act of 1847 (Sess. Acts 1847, pp. 94-5, §§ 1, 4) limiting the right of action to ten years, and not by that of 1825, allowing twenty years after the removal of disability within which to sue. The case would not be taken out of the provisions of the act of 1847 by section 15 of the act of 1855 (R. C. 1855, p. 1053). Under a proper interpretation of that section the action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in that section can have no reference to those in force when the right of action accrued, but when the act of 1855 took effect. It can have no reference to any acts of limitation prior to those of 1847. (See *Billion v. Walsh*, 46 Mo. 492.)—*Gilker v. Brown*, 105.
3. *Corporations—Lexington Railroad and Coal Mining and Transportation Company—Act of limitation.*—Suit brought against a stockholder of the Lexington Railroad and Coal Mining and Transportation Company (see *Wagn. Stat.* 291, § 13), more than a year after the debt was contracted, was barred by the statutory limitation of the act touching manufacturing and business companies (*Wagn. Stat.* 336, § 13). The one-year limitation of time for commencing suit was not so short as to justify the Supreme Court in declaring it unreasonable, and the law for that reason invalid. The act was wholly prospective, and therefore constitutional.—*Adamson v. Davis*, 268.
See **LANDS AND LAND TITLES**, 7, 13, 14, 15.

M

MANSLAUGHTER.

See PRACTICE, CRIMINAL, 16, 17

MECHANICS' LIENS.

1. *Mechanic's lien*—*Notice signed by one of several joint contractors, for all, sufficient.*—In suit on a mechanic's lien, brought by several joint contractors, the notice of suit required by the statute (Gen. Stat. 1865, p. 768, § 19; Wagn. Stat. 911, § 19) need not be signed by each contractor, but will be sufficient if signed by one for all.

A mechanic's lien filed by joint contractors first gave the several names of the lienors, and afterward referred to them as "the said 'A.' & Co." The paper was signed by the firm name. *Held*, that the lien was sufficient under the statute (Wagn. Stat. 909, § 6), although it was not formally alleged that the lienors composed the firm name of "'A.' & Co."—*Miller v. Faulk*, 262.

2. *Mechanic's lien, suit upon*—*Party defendant*—*Church.*—In suit on a mechanic's lien for work done on a church, plaintiff may bring suit without making the church corporation a party defendant.—*Id.*
3. *Mechanic's lien*—*Judgment against 160 acres, improper.*—Judgment against the entire farm of defendants, containing 160 acres, is unwarranted by the statute.—*Engleman v. Graves*, 348.
4. *Mechanic's lien*—*Married women, separate property of, when liable to lien.*—A married woman was shown to have had personal knowledge of work done and material furnished on her separate estate, and, to some extent to have given personal directions respecting it, although her husband was the principal manager. It was also shown that she joined her husband in the execution of a note in settlement of the claim; the claimants, however, declining to receive the note in adjustment of their demand. *Held*, that under such circumstances the property might be subjected to a mechanic's lien.—*Collins v. Megraw*, 495.
5. *Practice, civil*—*Pleadings*—*Note, motion for production of*—*Default for failure to answer, etc.*—In a mechanic's lien suit, plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note. *Held*, that a motion going to the merits of the petition should dispense with the necessity of answering till it is disposed of; but that such a motion was frivolous, and plaintiff was entitled to judgment notwithstanding for want of an answer.

If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper.—*Hill v. Meyer*, 585.

MISDEMEANOR.

See CRIMES AND PUNISHMENTS.

MISTAKE.

See AMENDMENTS. CONVEYANCES, 4. EQUITY, 11. REVENUE, 11.

MORTGAGES AND DEEDS OF TRUST.

1. *Sale of land—Description.*—Although a deed of trust described the real estate conveyed as two separate parcels of land, yet where it appeared that the parcels constituted but one farm, and by the advice of the trustees and with the assent of the beneficiary they were sold together, such sale was proper. *Kellogg v. Carrico*, 157.
2. *Mortgages, satisfaction of entered on record—Ten per cent. damages.*—Whenever any person whose property stands encumbered on the records has paid off and made full satisfaction of the mortgage or deed of trust constituting the encumbrance, he is entitled to have that satisfaction entered on the margin of the record, in order that he may exhibit a clear title, and that persons examining the records may not be misled. In case satisfaction is not entered he will be entitled to ten per cent. damages, whether the payment was received voluntarily or effected through the machinery of the courts.—*Verges v. Giboney*, 171.
3. *Deed of trust—Title passes to mortgagee after condition broken.*—In a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee. And the addition of a power to sell without judicial proceedings to foreclose can not avoid the legal effect of the grant. The trustee, after dishonor of the trust notes, could enter, and, without sale or foreclosure, could maintain his possession for the use of the beneficiary not only against all outsiders, but against the maker of the deed himself, until the payment of the trust note.—*Johnson v. Houston*, 227.
4. *Ejectment—Mortgage and deed of trust—Conveyance of land after condition broken by beneficiary, effect of.*—A married woman having purchased certain land, gave her notes for the purchase money, secured by deed of trust executed by herself jointly with her husband. The note being unpaid at maturity, the beneficiary, instead of the trustee in the deed, entered the premises, and, without sale under the trust deed, conveyed away the estate.
In ejectment by the maker of the deed of trust against the grantee of the beneficiary, *held*, that a stranger could not set up against the maker a title in another that arose from the deed of trust; but that defendant was not a stranger, for the conveyance to him, although it did not pass the legal title, operated as an assignment of the equity of the beneficiary. The grantee succeeded to all the rights of the grantor, and, being in possession, could defend successfully against the action until plaintiff paid the note. And *held*, further, that the claim of plaintiff would not be aided in law or equity by the fact that she was a married woman, and that the notes were executed by her as such.—*Id.*
5. *Mortgages and deeds of trust, foreclosure of—Installments on same note, suits upon—Cause of action.*—The pendency of a suit to foreclose a mortgage for the non-payment of one annual installment on a note is not sufficient ground for the abatement of a subsequent suit to foreclose the same mortgage, based on the non-payment of the next annual installment on the same note. Although the parties to the note and the mortgage are the same, yet the subsequent suit would be founded upon a different cause of action, and hence would not be deemed vexatious. It is immaterial that the evidence, as respects the instrument sued on, was the same.—*Jacobs, Adm'r of Lewis, v. Lewis*, 344.

MORTGAGES AND DEEDS OF TRUST—(Continued.)

6. *Conveyances — Deeds, absolute, coupled with agreement to convey a mortgage.* — A deed absolute on its face, coupled with an agreement that on payment of a given sum the grantee would convey, is a mortgage. — Sharkey v. Sharkey, 543.
7. *Attachment, claim for property under — Act of 1865 — Deed of trust, beneficiary in, party in interest.* — The beneficiary in a deed of trust of personal property is a party in interest, under the act of March 3, 1865, "concerning the duties of sheriff in St. Louis county" (Gen. Stat. 1865, ch. 160, §§ 28-9), and may file his claim with the sheriff and sue upon the bond taken. — State, to use of Peters, v. Koch, 582.
8. *Conveyances — Deed of trust — Sale — Merger.* — The grantee of personal property under a deed of trust does not forfeit his title under the deed by reason of the fact that the same property is afterward transferred to him by an absolute bill of sale which is void because not followed by a change of possession. (Wagn. Stat. 231, § 10.) The title under the deed does not merge in that acquired by the sale. The legal title under the deed was in the trustee, and the subsequent sale was only that of an equity. — *Id.*

See CONVEYANCES, 1. TRUSTS AND TRUSTEES, 3.

N

NEGLIGENCE.

See AGENCY, 4. DAMAGES, 4, 5, 6.

NODAWAY COUNTY.

See RAILROADS, 1.

NOTICE.

See ATTACHMENT, 1. CONVEYANCES, 5. LEASE, 1. MECHANIC'S LIEN, 1. PUBLICATION.

O

OFFICERS.

1. *Quo Warranto — Public office — Vacancy, power of County Court as to.* — Where one had been duly elected to a public office, had duly qualified and had entered upon its duties, and his term of office had not expired, but he had been unable to attend to its duties for a period of fifty days: *held*, that the County Court had no authority under the statute (Gen. Stat. 1865, p. 226, § 4) to declare the office vacant and fill it by appointment. This statute confers no jurisdiction upon the County Court to act in the premises until a vacancy actually exists. — State ex rel. Kiel v. Baird, 301.
2. *Insanity, how ascertained.* — The statutes provide for an inquiry into cases of alleged insanity, and enact a mode of proceeding by jury. An action of the County Court declaring a public office vacant by reason of the insanity of the incumbent, where this mode was not adopted, was unwarranted by law. — *Id.*

See CRIMINAL LAW, 2. ELECTIONS, 1, 2, 3. REVENUE, 10. SCHOOLS, 1.

ORDINANCES, CITY.

See ST. LOUIS, CITY OF.

P

PARTITION.

1. *Partition, sale in imports no warranty of title.*—In a suit by a sheriff on a note given by the purchaser of land at sheriff's sale in partition, for the payment of the purchase money, an answer averring failure of title in the grantor constitutes no defense. A sale in partition imports no warranty of title. The deed simply conveys the interest of the parties to the proceedings, and is only a bar against them and persons claiming under them.—*Cashion v. Faina*, 133.

PARTNERSHIP.

1. *Partnership—Account stated—Admissions.*—The admission by one of two partners of the correctness of an account stated against the partnership is sufficient in a suit against the firm on such account, even though for want of service the suit has been dismissed as to the partner making the admission.—*Cady v. Kyle*, 346.
2. *Partnership—Members liable, jointly and severally—Agreements between, etc.*—Under the statute (Wagn. Stat. 269, § 1) the members of a collecting firm are liable jointly and severally for the money collected. And one member will be liable for money collected by the other, although the partnership had been dissolved and it had been agreed that the former should wind up the business.

And in suit against the former for proceeds of money collected by the firm, the fact that defendant notified the sheriff not to pay over the money to his partner will not exonerate him.—*Bryant v. Hawkins*, 410.

3. *Partnership—Verbal agreement, contrary to statute of frauds, binding if carried out.*—In suit on a partnership account it appeared that A. and B., members of the firm, being about to trade with C., agreed with him verbally that payments by the firm should be first applied to satisfy a pre-existing debt owing by A. Held, that although the agreement might have been contrary to the statute of frauds, and therefore incapable of enforcement, yet if the parties went on and complied with its terms, and applied the payment to the old account, they could not repudiate it and afterward apply the payments to that of the firm.—*Mueller v. Wiebracht*, 468.

PRACTICE, CIVIL—ACTIONS.

1. *Ejectment—Judiciary act—Magwire v. Tyler—What points properly decided by the Supreme Court.*—Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of *Magwire v. Tyler* was the validity of the respective confirmations to *Brazeau* and *Labeaume*.

Under the decision of the Supreme Court in that case (8 Wall. 650) the legal title vested in plaintiff, and under that ruling his proper remedy was ejectment. But suit was brought by bill in equity, and should be dismissed.—*Magwire v. Tyler*, 115.

2. *Equity—Ejectment—Bill to set aside deed and vacate title can not be united with suit for possession.*—In a bill to set aside a deed as fraudulent,

PRACTICE, CIVIL—ACTIONS—(Continued.)

the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered establishing plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

3. *Equity—Statute changes only form of action—Court will not interfere in an action strictly equitable.*—Although, under the statute (Wagn. Stat. 999, § 1), legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action. The innovation extends only to the form of action in the pleadings. The party need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trover, trespass, or ejectment, without regard to ancient forms; but the distinction between the actions remains the same.

To entitle plaintiff to an equitable interference of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate and complete relief at law.—*Id.*

See ATTACHMENT. FORCIBLE ENTRY AND DETAINER, 1. HUSBAND AND WIFE, 12. MORTGAGES AND DEEDS OF TRUST, 5. PRACTICE, CIVIL—PLEADING, 8. REPLEVIN. TRESPASS.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—District Courts—Assignment of errors—Statement of case—Failure to file.*—The failure of appellant to file an assignment of errors and statement of the case before the District Court (Gen. Stat. 1865, ch. 135, § 38) up to the time when the case is reached upon the docket, is proper ground for dismissing the appeal.—State ex rel. Lathrop v. Dowling, 103.
2. *Practice, civil—District Court, no record of judgment in, effect of.*—In a case properly appealable through the District Court, where the record sets out no judgment of the District Court, and nothing to show that the cause is not still pending there, the case should be dismissed and stricken from the docket.—Howell v. Reynolds County, 104.
3. *Practice, civil—Appellate court will not disturb a verdict because against the weight of evidence.*—An appellate tribunal will not reverse simply because the verdict is against the weight of evidence, but to justify such an interference there must be a total and complete failure of testimony tending to support the issue.—McKay v. Underwood, 185.
4. *Practice, civil—Writ of error will lie to action of court on motion.*—When the overruling of a motion is a final and complete disposition of the subject-matter of a cause, the action of the court may be reviewed without a final judgment. Writ of error will lie to the action of the court on a motion without a final judgment.—Gale, Adm'r of Maupin, v. Michie, 326.
5. *Practice, civil—Judgment—Motion for new trial.*—Where appellant fails to move for a new trial, the judgment of the lower court will not be disturbed.—Beatty v. Furnald, 348.

PRACTICE, CIVIL—APPEAL—(Continued.)

6. *Practice, civil — Appeal — Judgment — Failure to file statement and brief.*—When defendant fails to file a statement and brief, as required by statute, the judgment will be affirmed.—*O'Neill v. Doyle*, 398.

See ADMINISTRATION, 11. COURT, ST. LOUIS CIRCUIT, 1. EQUITY, 18.
JUSTICES' COURTS, 1. PRACTICE, CIVIL—PLEADING, 2, 3. PRACTICE,
SUPREME COURT. REVENUE, 17, 18.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil — Parties — Jurisdiction where defendants reside in different counties.*—Under the practice act (Wagn. Stat. 1005), when there are several defendants, and they reside in different counties, the suit may be brought in any such county, and ordinarily the plaintiff would have the right to select the county for the institution of the suit; but jurisdiction must be fairly acquired, and can not be maintained when it is sought to be obtained by fraudulent representations for the purpose of oppression.—*Capital City Bank v. Knox*, 333.

See FRAUDULENT CONVEYANCES, 1.

PRACTICE, CIVIL—PLEADING.

1. *Attachment — Plea in abatement waived by pleading to merits — Amendment in law, effect of.*—Under the statute of 1855 (R. U. 1855, p. 252, § 47) a plea in abatement was waived by answering to the merits, and the rule is not modified by the amendment contained in the present statute, which provides that the suit shall proceed and be disposed of upon its merits, notwithstanding the defendant may succeed on his plea in abatement.—*Green v. Craig*, 90.
2. *Practice, civil — Exception — Amendment.*—Although defendant may except to the action of the court in striking out his answer, yet by afterward answering over he waives his right to avail himself of his exception.—*Gale, Adm'r of Maupin, v. Foss*, 276.
3. *Practice, civil — Amendment, filing of, permission as to rests largely in the discretion of court.*—The filing of amended pleadings is a matter resting largely in the discretion of the court. And where an answer was sought to be filed after the impaneling of the jury and the hearing of plaintiff's case, which changed materially the whole aspect of the suit, and no reason appeared why it was not filed earlier, the Supreme Court would not interfere with the exercise of that discretion in the lower court in refusing to allow the amendment.—*Id.*
4. *Practice, civil — Equitable offset — Mortgage — Surety — Injunction, etc.*—In a suit on a note or account, an answer alleging that plaintiff is insolvent, and that defendant is liable, as plaintiff's surety, upon an over-due promissory note to a third party; that a suit had been commenced to foreclose a mortgage given by plaintiff to secure the note, and that the mortgaged property, in the opinion of defendant, will prove insufficient to pay the note in full, discloses no existing claim in favor of the defendant against the plaintiff, either legal or equitable, nor does it show any ground for enjoining the suit.—*Hopkins v. Fechter*, 331.
5. *Practice, civil — Pleadings — Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written

PRACTICE, CIVIL—PLEADING—(Continued.)

- contract. But in suits on contracts of this nature the contracts must be distinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—*Henning v. United States Ins. Co.*, 425.
6. *Practice, civil—Pleadings—Answer—New matter must be set forth in pleadings.*—Under the old system of pleading the general issue, everything was open to proof which went to show a valid defense; but under the present practice act (Wagn. Stat. 1015, § 12), if defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language; otherwise he will be precluded from giving evidence of it at the trial.—*Northrup v. Mississippi Valley Ins. Co.*, 435.
7. *Practice, civil—Pleading—Demurrer—Defendant answering over, abandons.*—Defendant, by answering upon the merits after demurrer overruled, virtually withdraws and abandons the demurrer, although he makes no formal withdrawal.—*Pickering v. Mississippi Valley National Telegraph Co.*, 457.
8. *Practice, civil—Motion in arrest—Misjoinder of causes of action in same count.*—A motion in arrest does not bring up any question in relation to the mingling in the same count of different causes of action. A motion in arrest is designed to test the sufficiency of a petition or the sufficiency of the several counts therein.—*Id.*
9. *Practice, civil—Pleading—Breaches of a contract treated as independent causes of action—Objection to, can not be raised by motion in arrest.*—Whatever objection there may be to the technical accuracy of setting out each breach of a contract as a separate and independent cause of action, such objection is not available in a motion in arrest of judgment.—*Id.*
10. *Practice, civil—Pleadings—Negative pregnant, what averments not.*—In suit against an insurance company upon a draft, the petition alleged that defendant, "by draft in writing, signed by its secretary," made the obligation sued on. An answer denying that the company, "by its draft in writing, signed by its secretary," executed the obligation alleged, although inartistic, under our system is sufficient.—*First National Bank of Kansas City v. Hogan*, 472.
11. *Practice, civil—Pleadings—Answer—Reply—New matter—Judgment.*—In suit under the statute against a stockholder in a corporation, defendant, after admitting the insolvency and dissolution of the corporation as charged in the petition, alleged that his stock was paid in full, and that he had in addition paid corporation debts to an amount exceeding the total amount of his stock. *Held*, that the answer set up new matter which could alone be put in issue by a reply; and there being no reply, the facts stood admitted, and the judgment followed as of course. An averment in the answer of the medium of payment—as that it was in money—was wholly unnecessary.—*Ennis v. Hogan*, 513.
12. *Practice, civil—Pleadings—Reply, when result of accident or mistake, may be set aside.*—Where the failure to reply is the result of accident or mistake, the judgment may be set aside on reasonable terms where the motion to set aside is made in the term.—*Id.*

PRACTICE, CIVIL—PLEADING—(Continued.)

13. *Practice, civil—Pleading—Note, motion for production of—Default for failure to answer, etc.*—In a mechanic's lien suit, plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note. *Held*, that a motion going to the merits of the petition should dispense with the necessity of answering until it is disposed of; but that such a motion was frivolous, and plaintiff was entitled to judgment notwithstanding for want of an answer.

If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper.—*Hill v. Meyer*, 585.

See ADMINISTRATION, 5. CONTRACTS, 11. REPLEVIN, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Evidence—Verdict—New trial.*—Trial courts, if they believe that injustice has been done by the verdict, may grant a new trial, although they would not be justified in taking the issue from the jury, and although the appellate court could not in such cases interfere.—*Lockwood v. Atlantic Mutual Ins. Co.*, 50.

2. *Practice, civil—Issues in equity may be framed by the chancellor—Where not abused, the power will not be interfered with.*—It is permissible for a chancellor, in his sound discretion, to frame issues and take the opinion of a jury for his guidance; and when this power is not abused or wrongfully exercised it will not be interfered with. (Wagn. Stat. 1041, § 13.)—*Looker v. Davis*, 140.

3. *Practice, civil—Set-off, when greater than the amount claimed—Nonsuit.*—Under the provisions of our statute (Wagn. Stat. 1021, § 47) plaintiff may take a nonsuit although defendants plead a set-off exceeding the amount sued for.—*Fink v. Bruhl*, 173.

4. *Practice, civil—Actions—General verdict, when petition sets out different causes of action, bad.*—When a petition sets out several distinct causes of action, a verdict for an entire and gross sum can not be sustained. There should be a separate assessment on each cause or count, in order that the court may know how the issues were found and what amount was assessed on each count. But if there is one entire cause of action, and one good count in the declaration, a general verdict and general assessment of damages will answer.—*Brownell v. Pacific R.R. Co.*, 239.

5. *Practice, civil—Damages, action for, against railroad company—Cause of action—Count—General verdict.*—In suit against a railroad company for the killing of plaintiff's husband, the petition embraced two counts, framed respectively on the second and third sections of the act relating to damages (Wagn. Stat. 519-20). The first count charged that the killing was caused indirectly by the corporation, through the negligence, unskillfulness, and criminal intent of its employees; the second, that the death was owing directly to the neglect or default of the company. *Held*, that the two counts contained but one subject-matter of complaint, viz: the killing of complainant's husband; and therefore but one cause of action, although

PRACTICE, CIVIL—TRIALS—(Continued.)

stated in different ways to meet the evidence. Hence there could be but one verdict and one assessment.

A verdict based on either section would be a complete bar to a prosecution of the action on the other section. And where such is the case the cause of action must necessarily be the same.—*Id.*

6. *Practice, civil—Trial, judge of neighboring court may preside at, when, under section 17, article IV, of the State constitution.*—The judge of a Circuit Court may procure another judge to hold a particular term of court, giving up to him the whole business of the term; but he is not authorized, in order to prevent a change of venue in a particular cause, or for any other reason, to call in a neighboring judge to try that cause. And if he does call him in, although he try it never so fairly, it is a trial without authority of law, and his decision has no binding force.—*Gale, Adm'r of Maupin, v. Michie, 826.*
7. *Practice, civil—Trial—Venue, change of, matter of right.*—It is the duty of an interested judge, on motion, without application from either party, to award a change of venue, especially when those who present it insist on the change.—*Id.*
8. *Sales, questions of fact touching, submitted to the jury.*—In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, and whether there was a delivery to and subsequent possession by the vendee, are issues which, under proper instructions, should be submitted to the jury.—*Jones, Adm'r of Seals, v. Hook, Adm'r of Reed, 329.*
9. *Practice, civil—Chancery, issues in, opinion of the jury may be taken touching, etc.*—In the progress of a chancery proceeding the chancellor has the undoubted right to take the opinion of a jury on one or all of the issues arising in the cause. He may adopt their conclusion, but is not bound by it.—*Hickey v. Drake, 369.*
10. *Practice, civil—Jury, special—Impaneling of, may be ordered, when.*—A court may, in its discretion, order a special panel to try a cause, and such order is no ground of objection unless it appear that the party objecting was prejudiced or injured by the action of the court.—*Union Savings Association v. Edwards, 445.*
11. *Practice, civil—Weight of evidence—Referee.*—Issues triable by a jury may be referred to a referee, and in that case the referee is the sole judge of the weight of evidence, subject to review by the trial court. Appellate courts will not examine his decision touching weight of testimony.—*Daly v. Timon, 515.*

See EQUITY, 13. JUDGMENTS, 2. PRACTICE, CIVIL—PLEADING, 8, 13.

PRACTICE, CRIMINAL.

1. *Practice, civil—Selling liquor on Sunday—Indictment.*—Prior to the act of 1868, persons might be guilty of jointly keeping open tippling shops and selling liquors on Sunday, and might be jointly indicted for misdemeanor therefor.—*State v. Murphy, 274.*
2. *Criminal law—Indictments—Counts, what charges may be united in.*—Where a statute in one clause forbids several things or creates several offenses which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense, and they may all be united

PRACTICE—CRIMINAL—(Continued.)

- conjunctively in one count, and the count is sustained by proof of one of the offenses charged.— *Id.*
3. *Criminal law—Indictment—Signature of circuit attorney—Certificate by foreman of grand jury.*—The signature of the circuit attorney is not required to an indictment, and the want of a certificate thereto by the foreman of the grand jury can only be taken advantage of by motion to quash; and the motion to quash, to avail anything, must specify this defect.— *Id.*
 4. *Practice, criminal—Verdict—Jury—Discharge—Consent of prisoner.*—In criminal trials the court has the undoubted authority, in its discretion, to discharge a jury when satisfied that they would be unable to agree on a verdict, and without procuring the consent of the prisoner.— *State v. Matrassey*, 295.
 5. *Practice, criminal—Verdict—Separation of jury no ground for new trial, when.*—The mere fact of a separation of the jury in a criminal case will not invalidate a verdict or furnish ground for a new trial, there being no reason to suspect that they have been tampered with or that they have acted improperly. (*State v. Brannon*, 45 Mo. 329.)— *Id.*
 6. *Practice, criminal—Indictment—Degree of offense need not be specified in verdict, when.*—Under the present law (Wagn. Stat. 1107, § 1) it is unnecessary for the jury to specify the degree of the offense unless they convict of an inferior degree to the one charged in the indictment.— *Id.*
 7. *Practice, criminal—Motion to quash must state what.*—A general statement, in a motion or demurrer to quash an indictment, that the same is defective and insufficient, does not comply with the statute (Wagn. Stat. 1090, § 24). The specific defect must be pointed out.— *State v. Marshall*, 378.
 8. *Criminal law—False affidavit, information as to—Allegation.*—In an information under the statute (Wagn. Stat. 476, § 4) for making a false affidavit, if the authority of the magistrate to administer the oath is clearly asserted, that is sufficient, and the information need not set out the various facts which would authorize him to act as magistrate, such as his election, qualification, etc.— *Id.*
 9. *Criminal law—Indictment—False oath, allegations as to.*—In indictments for making false affidavits it has always been held that if the materiality of the oath appear from the facts or documents set forth in the indictment, it is sufficient without any express allegation on the subject.— *Id.*
 10. *Practice, criminal—Evidence in criminal cases examined in the Supreme Court.*—In criminal cases this court has always felt under obligation to examine the record and direct a new trial if conviction is not warranted by the evidence.— *Id.*
 11. *Practice, criminal—Indictment—Larceny—Checks and coin, description of, what insufficient.*—An indictment for larceny, which described the property stolen as "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars; five thousand dollars in money, of the value of five thousand dollars," should be held insufficient on demurrer.
Some further matter of description should be embodied so as to inform defendant of the specific check intended. Section 31 of the act in reference to practice in criminal cases (Wagn. Stat. 1091-2) does not include checks. And under that section, where coin of the United States is referred to, the

PRACTICE, CRIMINAL—(Continued.)

simple designation of it as money, without describing it as money made or issued by virtue of any law of the United States, is too indefinite.—*State v. Kroeger*, 530.

12. *Practice, criminal—Indictment, allegations in—Repugnancy.*—An indictment charged defendant with forging a check "purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis." The check afterward set out showed the signature of "M. E. Susisky, treasurer." *Held*, that the two allegations were not inconsistent with and repugnant to each other. (*State v. Finley*, 18 Mo. 445.)—*State v. Kroeger*, 552.
13. *Criminal law—St. Louis city treasurer—Blank check, filling out and using for a different purpose than that directed, constitutes forgery.*—The treasurer of the city of St. Louis left with A. certain blank checks, with directions to fill them up to the use of holders of warrants against the city; but A. took one of the checks, inserted the date and amount, and the words "cash or bearer" in place of the words "order of," erased from the printed blank. By whom the words were erased did not appear. A. converted the check to his own private use, by depositing it in bank the same day on his private account, and drawing the money on it for his own use. *Held*, that under the statute law of this State (Wagn. Stat. 470, § 16) he was guilty of forgery in the third degree. As the check had been signed with specific instructions to use it for a certain purpose, A., in thus filling it up for a different purpose, clearly made a false instrument.—*Id.*
14. *Criminal law—Homicide—Indictment—Threats and admissions of deceased, when admissible as res gestæ.*—In the trial of an indictment for murder, threats by the deceased against defendant, which were frequent and continuous down to the time of killing, and all blended together and inseparable, would be considered as a part of the *res gestæ*, and evidence touching them would be admissible to explain the act and show whether defendant acted in necessary self-defense. And testimony of the deceased, immediately after the tragedy, exculpating defendant, would be admissible on the same principle.—*State v. Sloan*, 604.
15. *Criminal law—Homicide—Killing on apprehension of bodily harm.*—Where a person apprehends great bodily harm, and there is reasonable ground for believing that the danger is imminent that such design will be accomplished, he may safely act on appearance, and even kill the assailant if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false—that there was in fact neither design to do him serious injury nor danger that it would be done.—*Id.*
16. *Criminal law—Manslaughter, court shall instruct jury as to what constitutes.*—When a jury is instructed that, under an indictment for murder, defendant may be convicted of manslaughter, it is gross error not to define what it takes to constitute manslaughter.—*Id.*
17. *Criminal law—Manslaughter in first degree implies something more than intentional violence.*—In order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that defendant was committing or attempting to commit some other offense than that of intentional violence upon the person killed.—*Id.*

PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court—Appeal—Failure to file transcript.*—When appellant fails to prosecute his appeal as required by law, and respondent files a complete transcript of the record and moves for an affirmance of the judgment, no reasons appearing why it should not be done, the motion will be granted.—*Bausman v. Kirtley*, 28.
2. *Practice, Supreme Court—Appeal—Failure to file transcript.*—When appellant fails to prosecute his appeal as required by statute, and respondent presents to this court a perfect transcript, no reasons being shown to the contrary, motion for affirmance of judgment will be sustained.—*Bobb v. Comfort*, 36.
3. *Practice, Supreme Court—Failure of appellant to file transcript in time—Affirmance.*—When it appears that promptness and diligence on the part of the appellant in bringing up his transcript are wholly wanting, his motion for leave to docket it out of time will be overruled; and respondent having filed a perfect transcript, judgment will, on his motion, be affirmed.—*Williams v. Kortsendorffer*, 72.
4. *Practice, Supreme Court—Appeal—Affirmance of judgment.*—When appellant fails to prosecute his appeal in the manner required by law, and respondent presents a complete transcript to this court, on his motion judgment will be affirmed.—*Koenig v. Rohlfing*, 163.
5. *Practice, civil—Trial—Instruction—Transcript—Bill of exceptions.*—Although instructions may appear among the papers in a cause and be spread upon the transcript, they will be disregarded unless they form a part of the bill of exceptions.—*Sturdivant v. Watkins*, 177.
6. *Practice, civil—Appeal—Bill of exceptions—Certificate of judge.*—A certificate by a judge attached to a bill of exceptions, that the testimony in the cause was taken by plaintiff in writing at the time and appeared correct, but had been mislaid or lost, and directing the clerk to transcribe and send up the testimony if found, but containing no statement that the evidence actually sent up was the evidence and all the evidence given in the cause, is not such a certificate as the law requires.—*Id.*
7. *Practice, civil—Testimony—Supreme Court.*—In law cases this court will not weigh conflicting testimony.—*Gradolph v. Fink*, 291.
8. *Practice, civil—Supreme Court—Exceptions—Review.*—Where no exceptions are saved by appellant, this court will not review the cause.—*Asbury v. Lenoir*, 298.
9. *Practice, civil—Evidence, Supreme Court will not weigh.*—Under the present system of practice, when a lower court tries a case, sitting as a jury, the Supreme Court will not undertake to weigh evidence, and say whether it justifies the trial court or not, except in a strictly equitable action; and where no question of law is raised a case can not be reviewed.—*Wielandy v. Lemuel*, 322.
10. *Practice, civil—Supreme Court.*—Where plaintiff in error fails to file any statement or brief, as required by the statute (*Wagn. Stat.* 1068, § 80), the cause will be dismissed.—*Thompson v. Thompson*, 351.

See ADMINISTRATION, 11. HABEAS CORPUS, 1. PRACTICE, CRIMINAL, 10.

PUBLICATION.

1. *St. Louis Record—Judicial publication in, imparted notice.*—A paper devoted to the gathering up and dissemination of legal news may be a news-
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paper, and in that sense the *St. Louis Legal Record* was a newspaper, and publication in it imparted notice of a sale under deed of trust.—*Kellogg v. Carrico*, 157.

2. *Sales, judicial—Advertisement—Sunday non dies.*—Publication of notice of judicial sale from March 12th to April 15th, inclusive, satisfied the requirements of a deed calling for thirty days' notice of sale. The Sunday omissions did not vitiate the notice.—*Id.*

Q**QUO WARRANTO.**

See **OFFICERS**, 1.

R**RAILROADS.**

1. *Railroads, subscription by County Court for—Mandamus.*—In *mandamus* against the County Court of Nodaway county to compel the issue of certain county bonds in payment of shares of stock in the Missouri Valley Railroad Company: *Held*, 1st, that the court might subscribe for the stock without submitting the matter to popular vote (Sess. Acts 1865, pp. 102-3, §§ 10, 11); 2d, that the fact that the road was not completed within the time called for by the contract—there being nothing to show that time was of the essence of the contract, and it appearing that the benefits sought to be derived from the road, and which were the inducements that led to the subscription, had accrued—would constitute no valid defense. If injury resulted from non-performance at the time, there might be an abatement in the shape of damages, but not an entire release from payment.—*Kansas City, St. Jo. & Council Bluffs R.R. Co. v. Alderman*, 849.

See **DAMAGES**, 2, 5, 6. **EVIDENCE**, 3. **JURISDICTION**, 1. **PRACTICE**, **CIVIL**—**TRIALS**, 5.

RECORD.

See **CONVEYANCES**, 5. **EVIDENCE**, 10.

REPLEVIN.

1. *Replevin—Wheat—Warehouse charges—Loss by fire—Set-off.*—In replevin for wheat, defendant justified the detention on the ground that he had a lien for warehouse charges. Plaintiff, *contra*, claimed that a part of the wheat had been destroyed through defendant's negligence to an amount equal to the storage charges. *Held*, that evidence touching the loss of the wheat was proper. The allowance of the damage therefor did not enlarge the scope of the petition permitting a recovery of wheat not sued for, but went simply to the extinguishment of defendant's lien.—*Babb v. Talcott*, 343.

See **ATTACHMENT**, 3.

RES ADJUDICATA.

See **COURTS**, **COUNTY**, 1.

RES GESTÆ.

See **EVIDENCE**.

REVENUE.

1. *Constitution, State, does not prohibit amendments or repeals by implication—Construction of statute.*—The act of March 18, 1870, touching the assess-

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ment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. iv, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it.—*State ex rel. Maguire v. Draper*, 29.

2. *Revenue—Tax delinquents, penalty imposed on—School fund.*—The Legislature plainly intended, by section 4 of the act of March 18, 1870 (Sess. Acts 1870, p. 115), to divert the ten per cent. penalty imposed upon tax delinquents from the school fund and add it to the tax of each kind.—*Id.*
3. *Revenue, collection of—Act of March 18, 1870, constitutional.*—The act of March 18, 1870, touching the assessment and collection of revenue on real estate (Sess. Acts 1870, p. 114), is constitutional. (*State ex rel. Maguire v. Draper*, ante, p. 29, affirmed.)—*State ex rel. McRee v. Maguire*, 35.
4. *Revenue, county—Roads—General county tax—Construction of charter.*—Citizens of the city of Hannibal are not exempt from county taxes by virtue of section 7, article ix, of the charter of that city (Sess. Acts 1851, p. 337). The charter merely exempts them from taxes "for any county road purposes." The word "road" was evidently omitted inadvertently.—*Jackson v. Meredith*, 89.
5. *Revenue—Foreign insurance companies—Ordinance compelling payment of \$200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to payment of \$200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, article iv, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, p. 780, Wagner's Statutes, compelling agents of foreign insurance companies to pay an annual tax of \$100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—*City of St. Louis v. The Independent Ins. Co. of Massachusetts*, 146.
6. *Revenue, license with view to—Municipal corporation.*—A right to license an employment does not imply the right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power. But the authority of the corporation will be limited to such a charge for the license as will cover the necessary expense of issuing it, and the additional

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labor of offices and expenses thereby imposed.—*City of St. Louis v. Boatmen's Ins. and Trust Co.*, 150.

7. *Revenue—Corporations—Insurance companies—St. Louis, city of, can not impose tax for revenue.*—The power given to the city of St. Louis in its charter to license insurance companies (Sess. Acts 1867, p. 65, art. iv, subd. 45) does not authorize the imposition of a tax for revenue.—*Id.*

8. *Revenue—Taxation—Clause of charter withdrawing corporation from operation of general law does not do away with taxing power.*—A clause in the act incorporating the Boatmen's Insurance and Trust Company of St. Louis, which withdrew it from the operation of the general law of 1855 relating to corporations, simply guaranteed it against alteration and repeal, and in nowise granted it immunity from taxation.

When the charter is silent on the subject of taxation, unless there is some contract to be impaired where there is a consideration given, it will never be presumed that the Legislature divests itself of the power to tax. The surrender of such an important prerogative is not to be deduced by implication.—*Id.*

9. *The City of St. Louis v. The Boatmen's Ins. and Trust Co.*, ante, p. 150, affirmed.—*City of St. Louis v. Marine Ins. Co.*, 163.

10. *Act of March 13, 1867—Construction of statute—Revenue—Special tax bills—Execution—Transcript.*—The act of March 13, 1867 (Sess. Acts 1867, p. 79, art. xi), repealing that of March 19, 1866 (Sess. Acts 1866-8, p. 79), does not authorize the enforcement of the judgment of a justice of the peace upon a special tax bill, on filing of a transcript of the judgment, by the issue of an execution thereon by the circuit clerk.—*Moran v. January*, 168.

11. *Revenue—County collector, errors of, in listing property, will not avoid assessment.*—The county collector is an executive officer, and has always been protected by his precept, unless it appears on its face to have been issued against property wholly exempt from taxation. Mere errors or irregularities in the manner of listing property, in the name of the supposed owner, or in any other respect not to render the paper void, will not excuse the collector from the performance of his duty.—*St. Louis Building and Savings Association v. Lightner*, 393.

12. *Revenue—Taxation—U. S. bonds, shares of stock invested in, may be taxed.*—Although United States bonds as such can not be taxed, the shares of the capital stock of a corporation can be taxed at their true value, although a part or the whole of it may be invested in such bonds. Thus the bonds are in effect taxed as affecting the value of the shares of stock; and where the officers of the bank furnish the assessor with the names of the shareholders, together with the amount of stock held by each, their shares should be so assessed as to cover the value of their bonds, and it will be the duty of their officers to pay this tax on behalf of the shareholders.

And where the officers make no objection on the ground of the irregularity of the assessment, and are themselves a party to it, and the claims of the assessor are substantially correct, upon no principle should they be permitted to say that his error in assessing the shares to the bank instead of its stockholders rendered the assessment void and the collector a trespasser.—*Id.*

13. *Revenue—Corporations, stock of, what liable to assessment.*—Not only the original stock, but all after-acquired capital stock of a corporation in private

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hands, is liable to assessment under the revenue act of 1864 (Sess. Acts 1863-4, p. 65).—*St. Louis Mutual Life Ins. Co. v. Charles*, 462.

14. *Revenue, action of assessor in matter of, judicial — Collector liable to tax-payer for property irregularly assessed, when.*—The action of the assessor and that of the board of appeals or County Court, in the matter of taxation, are judicial; and if it appears from the tax list that the assessor has jurisdiction over the property—i. e., that it is liable to taxation in any form, although irregularly assessed—he is not liable to the tax-payer for the amount collected.—*Id.*
15. *Revenue — Corporation — Capital stock — Shares of stock — Judgment against collector for taxes irregularly assessed, effect of.*—The statute makes a distinction between the liability to taxation of the property of a corporation embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the corporation pay the tax, they pay it for the shareholders; and if judgment is rendered against the collector for the amount of taxes collected by him from a corporation, the result of the judgment will be to collect of defendant, for the use of the shareholders, a sum of money in effect paid for them and which they were under obligation to pay.—*Id.*
16. *Revenue — Land commissioner, proceedings before for opening street — Assessments against adjoining property-owners — Property of can not be sold unless a bargain could not be made with owner of property sought to be taken — Injunction a proper remedy in such cases.*—To entitle the city of St. Louis to collect from adjoining property-owners the amount of assessments taxed against them for the opening of streets, under the city charter (Sess. Acts 1867, p. 72, § 2), it must appear that before instituting proceedings before the land commissioner for the condemnation of the property to be taken, an attempt was made with the owner thereof to effect an agreement as to the terms of purchase. The effort to make such agreement was an imperative obligation and constituted a condition precedent to the exercise of the right of eminent domain by the city. And the duty of proving the failure to agree devolved upon the city. The power to take private property for public use, without the consent of the owner, is in derogation of the rights of the citizen, and can only be justified on grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with.
 And where no such agreement is shown to have been made, the adjoining property-owner may restrain the city, by injunction, from selling his land to satisfy such assessment. Courts of equity never allow relief by injunction to prevent the sale of personal property; but where real property is about to be sold by a municipal corporation for the payment of taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title, and the court interferes to prevent it.—*Leslie v. City of St. Louis*, 474.
17. *Revenue — Land commissioner — Wharf opening — Attempt at bargain with property-owner — Jury — Change in jurors — Irregularity of proceedings.*—In proceedings before a land commissioner for the condemnation of property

REVENUE—(Continued.)

for wharf purposes in the city of St. Louis, it appeared that no attempt had been made by the city to effect an agreement with the owner for the purchase of the property before commencing proceedings; that before the verdict of the jury had been written out, one jurymen died and another left the country; that thereupon the commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn on different days; and that these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to any of the parties whose property was sought to be taken, that the trial was to be had *de novo*; and this new jury made out and published their verdict. *Held*, that the proceeding was utterly void: 1st, because no attempt was made to effect an agreement with the property-owner prior to the proceedings; 2d, because of the irregularity and palpable violation of the law in the matter of the proceedings for condemnation. But *held*, that in such case injunction by the parties whose property was sought to be condemned would not lie, since they would have a complete, adequate and ample remedy at law, and there would therefore be no necessity for resorting to equity. The trespass in this case sought to be enjoined may be compensated in damages, and, if possession of property were taken, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, where property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, as in the present case, a full and ample means would be afforded to review the proceedings and have their validity passed upon by a common-law writ of *certiorari*.—*Anderson v. City of St. Louis*, 479.

18. *Revenue—Taxes, assessment of by County Court—Certiorari will lie to review action of.*—The action of a County Court in assessing taxes upon property under the statute (Wagn. Stat. 1174, § 51) is clearly judicial, and hence the writ of *certiorari* will lie to review its action in this regard.—*State, on petition of Taylor, Adm'r of Lee, v. St. Louis County Court*, 594.
19. *Revenue—Bonds taxed according to the situs of the property, and not the domicile of its owner.*—Bonds of the "Masonic Hall Association" of St. Louis, in the hands of an administrator in St. Louis, are subject to taxation in this State, although the deceased owner of the bonds, at the time of his death, resided in Illinois, and the bonds had been once assessed in that State, and were only transferred to Missouri for the purpose of ancillary administration. The actual *situs* of personal property, and not the domicile of its owner, determines under the law of what State it shall be taxed. Section 24, page 115, Wagn. Stat., providing that real estate shall descend according to the laws of its *situs*, and personal property shall be distributed according to the laws of the domicile of the decedent, has no application to the case under consideration.

In no sense can it be said that the property represented by these bonds was in the possession of the foreign administrator; and it is immaterial that the bonds may have been transmitted from such foreign administrator for the purpose of ancillary administration.

Such bonds are not exempt from local taxation on the ground that the law makes no special provision for taxing such securities. Under our law, bonds are left to be taxed like other property where they can be reached, except that

REVENUE—(Continued.)

if the owner resides in the State they shall be taxed in the county of his residence. (Wagn. Stat. 116, § 9.)—*Id.*

ROADS, COUNTY

See REVENUE, 4.

S

ST. LOUIS, CITY OF.

1. *Revenue—Foreign insurance companies—Ordinance compelling payment of \$200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to the payment of \$200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, art. IV, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, p. 780, Wagner's Statutes, compelling agents of foreign insurance companies to pay an annual tax of \$100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—*City of St. Louis v. The Independent Ins. Co. of Massachusetts*, 146.
2. *Revenue—Corporations—Insurance companies—St. Louis, city of, can not impose tax for revenue.*—The power given to the city of St. Louis in its charter to license insurance companies (Sess. Acts 1867, art. IV, p. 65, subd. 45) does not authorize the imposition of a tax for revenue.—*City of St. Louis v. The Boatmen's Ins. and Trust Co.*, 150.
3. *Revenue—Taxation—Clause of charter withdrawing corporation from operation of general law does not do away with taxing power.*—A clause in the act incorporating the Boatmen's Insurance and Trust Company of St. Louis, which withdrew it from the operation of the general law of 1855 relating to corporations, simply guaranteed it against alteration and repeal, and in nowise granted it immunity from taxation.

When the charter is silent on the subject of taxation, unless there is some contract to be impaired where there is a consideration given, it will never be presumed that the Legislature divests itself of the power to tax. The surrender of such an important prerogative is not to be deduced by implication.—*Id.*

4. *Revenue—Land commissioner, proceedings before for opening street—Assessments against adjoining property-owners—Property of can not be sold unless a bargain could not be made with owner of property sought to be taken—Injunction a proper remedy in such cases.*—To entitle the city of St. Louis to collect from adjoining property-owners the amount of assessments taxed against them for the opening of streets, under the city charter (Sess. Acts 1867, p. 72, § 2), it must appear that before instituting proceedings before the land commissioner for the condemnation of the property to be taken, an attempt was made with the owner thereof to effect an agreement as to the terms of purchase. The effort to make such agreement was an imperative obligation and constituted a condition precedent to the exercise of the right of eminent domain by the city. And the duty of proving the failure to

ST. LOUIS, CITY OF—(Continued.)

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6. *Revenue—Land commissioner—Wharf opening—Attempt at bargain with property-owner—Jury—Change in jurors—Irregularity of proceedings.*—In proceedings before a land commissioner for the condemnation of property for wharf purposes in the city of St. Louis, it appeared that no attempt had been made by the city to effect an agreement with the owner for the purchase of the property before commencing proceedings; that before the verdict of the jury had been written out, one jurymen died and another left the country; that thereupon the commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn on different days; and that these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to any of the parties whose property was sought to be taken, that the trial was to be had *de novo*; and this new jury made out and published their verdict. *Held*, that the proceeding was utterly void: 1st, because no attempt was made to effect an agreement with the property-owner prior to the proceedings; 2d, because of the irregularity and palpable violation of the law in the matter of the proceedings for condemnation. But *held*, that in such case injunction by the parties whose property was sought to be condemned would not lie, since they would have a complete, adequate and ample remedy at law, and there would therefore be no necessity for resorting to equity. The trespass in this case sought to be enjoined may be compensated in damages, and, if possession of property were taken, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, where property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, as in the present case, a full and ample means would be afforded to review the proceedings and have their validity passed upon by a common-law writ of *certiorari*.—*Anderson v. The City of St. Louis*, 479.

6. *St. Louis, city of—Ordinance—Water-pipe, averment as to necessity of.*—The act to enable the city of St. Louis to procure a supply of wholesome water (Adj. Sess. Acts 1868, p. 291) declares, among other things, that "whenever the city council shall, by a vote of two-thirds of all the members elected, declare the laying of a water-pipe to be necessary, the board of water commissioners shall cause the same to be laid." An ordinance of the city council authorizing the laying of a certain water-pipe did not in direct terms declare the laying of the same to be necessary. *Held*:

ST. LOUIS, CITY OF—(Continued.)

1. That the ordinance was not for that reason invalid. The passage of the ordinance was equivalent to an averment that the necessity had arisen, and had been declared and acted upon.

2. A resolution of the council requesting the commissioners to suspend the laying of the water-pipe did not have the binding force of law, nor did it revoke the previous ordinance.

3. The passage of the ordinance constituted a justification for the proceedings of the commissioners in laying the pipe, although the ordinance failed to show that it was passed by a vote of two-thirds of all the members elected to the council. The commissioners had a right to assume that the ordinance was legally passed. If two-thirds of all the members elected did not vote for it, it was illegal and void, but to determine that matter the proceedings of the council itself should be brought up.—*Young v. The City of St. Louis*, 492.

ST. LOUIS LEGAL RECORD.

See PUBLICATION, 1.

SALES.

1. *Sales, judicial — Advertisement — Sunday non dies.*—Publication of notice of judicial sale from March 12th to April 15th, inclusive, satisfied the requirements of a deed calling for thirty days' notice of sale. The Sunday omissions did not vitiate the notice.—*Kellogg v. Carrico*, 157.
2. *Sale of land — Description.*—Although a deed of trust described the real estate conveyed as two separate parcels of land, yet where it appeared that the parcels constituted but one farm, and by the advice of the trustees and with the assent of the beneficiary they were sold together, such sale was proper.—*Id.*
3. *Sales, questions of fact touching, submitted to the jury.*—In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, and whether there was a delivery to and subsequent possession by the vendee, are issues which, under proper instructions, should be submitted to the jury.—*Jones, Adm'r of Seals, v. Hook, Adm'r of Reed*, 329.
4. *Sheriff's deed, recitals in.*—The recitals in a sheriff's deed are conclusive on the parties to the deed and those claiming under them.—*Durette v. Briggs*, 356.
5. *Executions — Sales under satisfied executions — Evidence, parol, touching.*—When it appears that certain of the premises levied on were sold by virtue of one or more executions after such executions were satisfied by the sale of other property, the deed as to such premises so subsequently sold is void and inoperative; and the question whether the premises were sold under executions which had thus performed their office was one to be decided either by the recitals of the sheriff's deed or by evidence aliunde.—*Id.*
6. *Sales — Vendor's lien waived by taking collateral security.*—It is the settled law of this State that where the vendor of land takes collateral security for the purchase money, he will be presumed to have waived his lien upon the land conveyed; and if he entertained a different intent, he must show it by satisfactory testimony.—*Id.*

See ADMINISTRATION, 9. CONVEYANCES, 3. EQUITY, 11. EVIDENCE, 4. EXECUTIONS, 2. INJUNCTION, 2. TRUSTS AND TRUSTEES, 3.

SCHOOLS.

1. *School, normal* — *State auditor* — *Allowance to members of board of regents for attendance at meeting.* — Under the act in aid of normal schools (Sess. Acts 1870, p. 134, §§ 3, 6, 8), members of the board of regents are entitled, for the first meeting of the board, to mileage from their places of residence to Jefferson City, from thence to the points in succession which they are called on officially to visit, and thence to their places of residence. And they are entitled to a per diem not to exceed six days, although they may lawfully do business for a longer period. — *State ex rel. Milner v. Draper*, 265.

SEAL.

See ATTACHMENT, 2.

SET-OFF.

See PRACTICE, CIVIL — PLEADING, 4. PRACTICE, CIVIL — TRIALS, 3. REPLEVIN, 1.

SHERIFFS' SALES.

See CONVEYANCES, 3, 6. INJUNCTION, 2. PARTITION, 1. SALES, 5.

SPECIFIC PERFORMANCE.

See CONTRACTS, 3.

STATUTE, CONSTRUCTION OF.

1. *Constitution, State, does not prohibit amendments or repeals by implication* — *Construction of statute.* — The act of March 18, 1870, touching the assessment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. IV, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it. — *State ex rel. Maguire v. Draper*, 29.

2. *Repeals by implication not favored.* — The law does not favor repeals of statutes by implication. A later statute, which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent. — *City of St. Louis v. The Independent Ins. Co.*, 146.
3. *Elections* — *County treasurer, appointed in January, 1871, entitled to office as against one elected in November.* — A. was elected county treasurer of St. Louis county in November, 1870. B. was appointed treasurer in January, 1871. In *quo warranto* to test the title of A. to the office, *held*, that the election in November was illegal and void; that notwithstanding that election, the office was vacant on January 5, 1871, and that B. was properly appointed to fill the vacancy.

STATUTE, CONSTRUCTION OF—(Continued.)

The clause of the act of March 3, 1857, fixing on the first Monday of August, 1858, and every six years thereafter, as the time for the election, was, in its designation of the day of the week for the election, in conflict with section 2, article II, of the present State constitution, and was therefore, so far forth, repealed; but the constitution did not affect the six years provided for the treasurer's term of office. And the Legislature was authorized to alter the law as to the day of the week, and fix on the Tuesday following the first Monday in August as that for the election. (Sess. Acts 1865-6, p. 88.) Hence the day for election was properly in August, and not in November.—*State ex rel. Attorney-General v. Fiala*, 310.

4. *Elections—County treasurer—Act of March 19, 1866, a general and not special law relative to the time of holding county, town and city elections.*—The act of March 19, 1866 (Sess. Acts 1865-6; p. 88), is not void as being in conflict with that part of section 27, article IV, of the State constitution which prohibits special legislation. Nor was it unconstitutional as reviving a special law. The act of March 3, 1857, was never revived by it.—*Id.*
5. *County treasurer—Elections—Act of March, 1857, not repealed by section 1, chapter 38, Gen. Stat. 1865, or by act of March 22, 1870.*—The act of March 3, 1857, was not repealed either by section 1, chapter 38, Gen. Stat. 1865, or the act of March 22, 1870 (Sess. Acts 1870, § 35). Neither of the last-named enactments had any reference to the local act of 1857. The object of that of March 22, 1870, was to amend the general law in relation to county treasurers (Gen. Stat. 1865, ch. 38, § 1). But, even supposing that the act of March, 1870, had been enacted as a new law throughout, and that its provisions were in conflict with the prior local act, it did not have the effect of repealing it by implication, as nothing indicates an intention on the part of the Legislature to do away with the local act. Section 2 of the act of March, 1870, in terms repealing all acts and parts of acts in conflict with it, refers only to general, inconsistent laws. It was no part of the purpose of the act to touch the question of elections or the term of office.—*Id.*
6. *Insurance, foreign—Agent—Proceedings against—Information—Court of Criminal Correction.*—One acting as agent and receiving premiums in St. Louis county, on behalf of a foreign insurance company which was not authorized by the superintendent of the insurance department to do business in this State, contrary to section 42 of the act concerning insurance other than life (Wagn. Stat. 777), may be proceeded against under section 30, p. 516, Wagner's Statutes. Notwithstanding that the statute which creates the offense provides for a different remedy (Wagn. Stat. 777, § 43), there is no inconsistency between the two statutes. But the proceeding in such case must be by information in the Court of Criminal Correction, and not by indictment.

As to all the rest of the State besides St. Louis county, the misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), repealed by implication section 30 *supra*, and it was not restored by the repealing act of February 24, 1869 (Sess. Acts 1869, p. 69). (See *State v. Huffschtmidt*, *ante*, p. 73.)—*State v. Stewart*, 382.

ADMINISTRATION, 4 (Sess. Acts 1845, p. 70), 6 (Sess. Acts 1866, p. 85, § 6),

7 (Wagn. Stat. 102, § 2), 9 (Wagn. Stat. 98, § 33).

ARBITRATION AND AWARD, 1, 3 (Wagn. Stat. 143, §§ 3, 6).

STATUTE, CONSTRUCTION OF—(Continued.)

- ATTACHMENT, 1 (Gen. Stat. 1865, p. 569, § 60; Wagn. Stat. 193, § 60.)
 BANKRUPTCY, 1 (U. S. Stat. at Large, 1867, p. 533).
 CONTRACTS, 5 (Wagn. Stat. 137, § 17), 8 (R. C. 1855, p. 1502, § 24; Sess. Acts 1859-60, p. 91; Sess. Acts 1858-9, p. 176).
 CRIMES AND PUNISHMENTS, 1 (Wagn. Stat. 504, § 35; *id.* 516, § 24; *id.* 894, § 3; Sess. Acts 1868, p. 81; Gen. Stat. 1865, ch. 207, § 30; Sess. Acts 1869, p. 69, § 30), 3 (Wagn. Stat. 470, § 16).
 CRIMINAL LAW, 2 (Wagn. Stat. 488, § 19).
 DOWER, 1 (Wagn. Stat. 544, § 29).
 EXECUTIONS, 2 (Sess. Acts 1863, p. 20, § 1).
 HUSBAND AND WIFE, 1 (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331-2, § 14; *id.* 935-6, § 14).
 INJUNCTION, 3 (Wagn. Stat. 1030, § 13).
 INSURANCE, FIRE AND MARINE, 1 (Gen. Stat. 1865, ch. 90, § 1).
 INSURANCE, LIFE, 3, 4, 5 (Wagn. Stat. 936, §§ 15, 18).
 JUDGMENT, 1 (Sess. Acts 1869, p. 18, § 2).
 JURISDICTION, 1 (Wagn. Stat. 292, § 19).
 JUSTICES' COURTS, 1 (Wagn. Stat. 850, § 23).
 LANDS AND LAND TITLES, 11 (Wagn. Stat. 1312, § 31; *id.* 1310, § 24), 13 (Wagn. Stat. 1022, § 53).
 LIMITATIONS, 2 (Sess. Acts 1847, pp. 94-5, §§ 1, 4; R. C. 1855, p. 1053, § 15), 3 (Wagn. Stat. 291, § 13; *id.* 336, § 13).
 MECHANICS' LIEN, 1 (Gen. Stat. 1865, p. 768, § 19; Wagn. Stat. 911, § 19; *id.* 909, § 6).
 MORTGAGES AND DEEDS OF TRUST, 7 (Gen. Stat. 1865, ch. 160, §§ 23-9), 8 (Wagn. Stat. 281, § 10).
 PARTNERSHIP, 2 (Wagn. Stat. 269, § 1).
 PRACTICE, CIVIL—PARTIES, 1 (Wagn. Stat. 1005).
 PRACTICE, CIVIL—PLEADING, 1 (R. C. 1855, p. 252, § 47), 6 (Wagn. Stat. 1015, § 12), 13 (Wagn. Stat. 1045, § 40).
 PRACTICE, CIVIL—TRIALS, 3 (Wagn. Stat. 1021, § 47), 5 (Wagn. Stat. 519-20, §§ 2, 3).
 PRACTICE, CRIMINAL, 6 (Wagn. Stat. 1107, § 1), 7 (Wagn. Stat. 1090, § 24), 8 (Wagn. Stat. 476, § 4), 11 (Wagn. Stat. 1091, § 31).
 RAILROADS, 1 (Sess. Acts 1865, pp. 102-3, §§ 10, 11).
 REVENUE, 1, 2 (Wagn. Stat. 1193, § 88; Gen. Stat. 1865, ch. 12, § 66; Sess. Acts 1870, p. 115, § 4), 3 (Sess. Acts 1870, p. 114), 4 (Sess. Acts 1851, p. 337), 5, 7 (Wagn. Stat. 780, § 6; Sess. Acts 1867, p. 45, § 1, subd. 45), 10 (Sess. Acts 1867, p. 79, art. XI; Sess. Acts 1865-6, p. 79), 16 (Sess. Acts 1867, p. 72, § 2), 18 (Wagn. Stat. 1114, § 51), 19 (Wagn. Stat. 115, § 24; *id.* 116, § 9).
 ST. LOUIS, CITY OF, 6 (Adj. Sess. Acts 1868, p. 291).
 SCHOOLS, 1 (Sess. Acts 1870, p. 134, §§ 3, 6, 8).
 WILLS, 8 (R. C. 1855, p. 795).
 WITNESSES, 1, 2 (Wagn. Stat. 1371, § 1).

STOCKHOLDER.

See LIMITATIONS, 3. PRACTICE, CIVIL—PLEADING, 11.

SUNDAY.

See CRIMES AND PUNISHMENTS, 1. PRACTICE, CRIMINAL, 1. PUBLICATION, 2.

SUPREME COURT.

See PRACTICE, SUPREME COURT.

STREET-OPENING.

See ST. LOUIS, CITY OF, 4, 5.

SURETIES.

See ADMINISTRATION, 4, 5. EVIDENCE, 9.

SWAMP LAND.

See LANDS AND LAND TITLES, 6.

T**TRANSCRIPTS.**

See EXECUTIONS, 1. PRACTICE, SUPREME COURT, 5, 6.

TREASURER, COUNTY.

See ELECTIONS, 1, 2, 3.

TRESPASS.

1. *Trespass—Action for, by plaintiff claiming merely by possession, must show a seizure and carrying away.*—In trespass for carrying away from the possession of plaintiff a certain horse, where the evidence showed that plaintiff was not the rightful owner of the animal, but that his claim rested on mere possession, and that the horse voluntarily strayed from him and came into the possession of defendant; that there was no actual taking or seizing or removing from plaintiff's control: *Held*, that plaintiff was not entitled to recover.—*Pope v. Cordell*, 251.

See DAMAGES, 1.

TRUSTS AND TRUSTEES.

1. *Agency—Co-owners of boat—Private bargain for transportation of freight—Trust.*—One who was a part owner and general active and managing agent of a steamboat, made a contract in his own name for the transportation of certain freight at a specified price. The contract was not made with reference to its being performed by the steamer mentioned, which was not at that time in port; but the contractor made use of the boat for the transportation of the freight, without mentioning to his co-owners his private arrangement as to price of freightage. *Held*, that he occupied a relation of trust toward the co-owners, and that they had a right to presume that he would exercise the most entire good faith in his dealings toward them, and that in any business in which he employed the boat they were entitled to a proportionate share of the profits received and earned.—*Rea v. Copelin*, 76.
2. *Agency—Trustee not allowed to profit out of his trust—Application of rule.*—The rule that a trustee is not allowed to make a profit out of his trust is based on a principle of human nature that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict; and by a trustee, in this sense, is meant a person who acts representatively, or whose office is to advise and operate not for himself, but for others. This principle applies to and includes executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who in any respect have a concern in the business intrusted to them.—*Id.*

TRUSTS AND TRUSTEES—(Continued.)

3. *Trusts and trustees—Sale of land under deed of trust—Re-sale—Advertisement—Postponement.*—Where a purchaser at a trustee's sale refuses to complete the contract, it would be improper for the trustee to re-sell on the same day. His obvious duty would be to re-advertise and sell upon full notice, when the bidding would be open to competition, and a fair price might be obtained.

But a sale of this character must be distinguished from a regularly adjourned sale. The trustee may regularly adjourn a sale to a different time and place when in his discretion, fairly exercised, it shall seem to him necessary in order to obtain a fair auction price for the property. He should always postpone the sale when necessary to obtain a fair price, and should never permit the creditor to force the sale at an inadequate price.—*Judge v. Booge*, 544.

See MORTGAGES AND DEEDS OF TRUST. WILLS, 5.

U

UNIVERSITY OF THE STATE OF MISSOURI.

See CONTRACTS, 8.

USAGE.

See CONTRACTS, 10.

V

VENDOR'S LIEN.

See LIEN, VENDOR'S.

VENUE.

See PRACTICE, CIVIL—TRIALS, 6, 7.

VERDICT.

See EQUITY, 13. PRACTICE, CIVIL—TRIALS 4, 5. PRACTICE, CRIMINAL, 4, 5, 6.

W

WHARF.

See ST. LOUIS, CITY OF, 5.

WILLS.

1. *Equity—Election, general principle of.*—The general principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.—*Graham v. Roseburgh*, 111.
2. *Equity—Specific performance—Election.*—A testator made a devise of "the residue" of his estate, in trust for the use and benefit of his heirs, among whom was A. Afterward the testator agreed to convey to A. a certain tract in Shelby county, which tract A. proceeded to possess and improve. On testator's death, the trustees paid over to A. his portion of the uses and profits derived from the "residue." In suit against the trustees for specific performance of testator's contract to convey, *held*, that A. would not be compelled

WILLS—(Continued.)

- to elect between the rents and profits of his share in the residue and the land in controversy. The disposal of the Shelby land during the lifetime of the testator took it out of the residuary clause, and showed that he had no intention to include that property in the devise.—*Id.*
3. *Wills*.—A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to the estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7-11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held*: 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust, yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—*Hook, Adm'r of Dyer, v. Dyer, 214.*
4. *Wills—Devise*.—The devise of an estate, with the power of disposal, will pass the fee.—*Hazel v. Hagan, 277.*
5. *Wills—Widow executrix, sale by after expiration of office—Personal trust*.—A testator willed to his wife all his property during her life. He also willed that the land might be sold at any time for her comfort and benefit. The will, moreover, designated the widow as one of the executors. *Held*, that the power of sale was a mere personal trust, not to be executed by the widow in virtue of her office as executrix, but at any time that she might deem it advisable to carry out the design of the testator.—*Id.*
6. *Will, conveyance under, sufficiently executes power, when*.—A conveyance made pursuant to a will, containing a direct reference to the power embraced in the will, and in a manner so direct as to leave no room for doubt as to the intention of the grantor, sufficiently executes the power contained therein.—*Id.*
7. *Wills—Executor can not act without qualifying, except when*.—Under the law of this State the executor, by virtue of being so named, has no power to intermeddle with the estate of the testator except under pressing necessity, and only so far as is necessary, until letters have been obtained; although if he shall so intermeddle, and shall subsequently qualify, his letters will relate back and cover his former acts.—*Stagg v. Green, 500.*
8. *Wills—Act of 1825, child not mentioned, can not take child's share unless forgotten*.—Under the act of 1825 touching wills (R. C. 1825, p. 795), a child not mentioned in a will is not entitled to a child's share in the inheritance,

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under the general law of descents and distributions, unless it is manifest from the will that the child was forgotten, and so unintentionally omitted.—*McCourtney v. McCourtney*, 583.

9. *Wills—Legacies—Survivorship—Death of legatee before that of testator—Lapse.*—A testamentary disposition will lapse by the death of the legatee during the life of the testator. But if a legacy be given to certain persons by name, and in the event of the death of either of them to the survivor, the alternative gift will take effect if the first legatee or devisee die even in the testator's lifetime.—*Martin v. Lachasse*, 591.

WITNESSES.

1. *Witnesses, statute concerning relates to parties to suit and issues on trial.*—The proviso of the statute concerning witnesses (Wagn. Stat. 1872, § 1) relates wholly to persons who are parties to the suit, the issue arising in which is on trial, and not to others who were merely parties to the original contract. The object and purpose of the statute was undoubtedly to put the two parties to a suit upon terms of substantial equality in regard to the opportunity of giving testimony.—*Looker v. Davis*, 140.
2. *Witnesses—Where one party is dead, statute concerning applies only where witness is party to a contract and the suit.*—The purchaser of land at sale under deed of trust sued the possessor in ejectment. The latter brought his cross-action by injunction to restrain the purchaser from further steps in his ejectment. The bill, among other things, set up an agreement between the maker and the beneficiary in the trust deed whereby the latter agreed to cancel the same, provided the maker would convey the land to the plaintiff in the injunction suit; and the bill averred that the land had been so conveyed to him. Although the beneficiary in the deed was dead at the time of bringing the suit, *held*, that under section 1, page 1872, Wagn. Stat., plaintiff was a competent witness as to the contract set up, not having been a party thereto. The rule excluding testimony under that statute applies only where the witness is party to the suit and also to the contract.—*Id.*

See EVIDENCE, 12.

